Supreme Court, U.S.
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No. 1968

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

LOS ANGELES RAIDERS, a limited partnership,
Petitioner,

VS.

NATIONAL FOOTBALL LEAGUE, an unincorporated association, BALTIMORE FOOTBALL CLUB, INC., BUFFALO BILLS, INC., CHARGERS FOOTBALL CO., CHICAGO BEARS FOOTBALL CLUB, INC., CINCINNATI BENGALS, INC., CLEVELAND BROWNS, INC., DALLAS COWBOYS FOOTBALL CLUB, INC., DETROIT LIONS, INC., THE FIVE SMITHS, INC., GREEN BAY PACKERS, INC., HOUSTON OILERS, INC., KANSAS CITY CHIEFS FOOTBALL CLUB, INC., LOS ANGELES RAMS FOOTBALL CO., MIAMI DOLPHINS, LTD., MINNESOTA VIKINGS FOOTBALL CLUB, INC., NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC., NEW ORLEANS SAINTS LOUISIANA PARTNERSHIP, THE NEW YORK FOOTBALL GIANTS, NEW YORK JETS FOOTBALL CLUB, INC., PHILADELPHIA EAGLES FOOTBALL CLUB, INC., PITTSBURGH STEELERS SPORTS, INC., PRO-FOOTBALL, INC., EFK SPORTS, LTD., sued herein as ROCKY MOUNTAIN EMPIRE SPORTS, INC., ST. LOUIS FOOTBALL CARDINALS CO., SAN FRANCISCO FORTY-NINERS, SEATTLE PROFESSIONAL FOOTBALL, and TAMPA BAY AREA NFL FOOTBALL, INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

*MOSES LASKY
LASKY, HAAS, COHLER & MUNTER
505 Sansome Street, 12th Floor
San Francisco, CA 94111
Telephone: (415) 788-2700

JOSEPH L. ALIOTO
ALIOTO & ALIOTO
650 California Street, 23rd Floor
San Francisco, CA 94108
Attorneys for Petitioner
Los Angeles Raiders

**Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

Under F.R.Civ.P. Rule 42(b), a case is bifurcated into a first trial on liability and a later trial, if necessary, on amount of damages. It was adjudicated on the first trial that prevention by a professional sports league of a present member from moving its home site to another territory was an unreasonable restraint of trade under Sherman Act § 1, and that judgment was affirmed on appeal under a Rule 54(b) determination of finality.

1. Has not the judgment the same *res judicata* effect in an appeal from a later judgment for damages at the second trial as if it had been rendered in a different action?

2. Prevention by a professional sports league of a present member's moving to another territory having been so adjudicated to be unlawful, is that territory "property" owned by the league for which it can charge the member a price?

3. May a violator of Sherman § 1 exact a price from the victim for the monetary value of freedom from future restraint effected by an injunction issued at the first trial and affirmed on the first appeal? May the violator do so by an offset against the damages for past restraint?

4. If an offset were permissible, must it not be applied after trebling the damages, not before; and does not directing it *before* trebling reward the law violator by trebling the value of its unlawful exclusion?

5. Must a plaintiff in a private antitrust case elect between damages and an injuction, or are they not two different remedies, the one redressing the past and the other addressing the future?

6. Where Congress has repeatedly denied to the National Football League the statutory right to create or enforce territorial exclusivity for member clubs, may a court do so under the theory that a league, as some kind of entity, owns the territories where each member plays so as to be entitled to charge a price to a member for permission to move?

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LOS ANGELES RAIDERS, a limited partnership,
Petitioner,

VS.

NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Respondents.[1]

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner Los Angeles Raiders[2] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Los Angeles Memorial Coliseum Commissison v. National Football League, et al.; Oakland Raid-*

All emphasis in quotations in this petition is added unless otherwise noted.

[1] The names of respondents other than National Football League itself are stated in the caption on the cover of this petition.

[2] Petitioner is a limited partnership. Allen Davis is the sole General Partner, and the limited partners are Andrews Construction Co., Lou Barroero, Arnold Boscacci, Eugene Boscacci, John Brooks, Julius N. Hartman, E.J. McGah, Gladys Sargent, Ralph J. Vail, Wilfred Winkenbach. Former limited partners Sheldon Milenbach, Henry Trione, and Frank Ivaldi may have an interest in the outcome. No one else has.

ers, Ltd. v. National Football League, et al., Nos. 83-5907, 83-5908, and 83-5909 in that court.

OPINIONS BELOW

The opinion of the court of appeals is reported at 791 F.2d 1356 (1986) and is set out as Appendix B. An opinion on a prior appeal by the National Football League et al., is reported at 726 F.2d 1381 and is set out in Appendix C.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment was made and entered on June 16, 1986.

All parties, both appellants and appellee (the petitioner), filed timely petitions for rehearing on June 30, 1986. The court below denied the petition of Los Angeles Raiders on October 20, 1986, but overlooked making disposition of appellants' petition until the oversight was called to its attention by the Los Angeles Raiders' noting that "the appellee Raiders cannot file a petition for writ of certiorari in the United States Supreme Court until this Court has denied all timely filed petitions for rehearing". Thereupon, on March 12, 1987, the court entered its order referring to "our oversight concerning the still-pending National Football League (NFL) petition for rehearing" and stating that "In order to bring this matter to a conclusion in this court: . . . the [NFL] petition for rehearing is denied . . ." (A copy of the order is attached as Appendix D).

The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. The district court had jurisdiction under 15 U.S.C. § 15 and 28 U.S.C. § 1337.

STATUTES INVOLVED

The statutes involved are Sherman Act, Act of July 2, 1890, c. 647, 26 Stat. 209, § 1, as amended, 15 U.S.C. § 1, and Clayton Act, Act of October 15, 1914, c. 323, 38 Stat. 731, as amended, §§ 4 and 16, 15 U.S.C. § 15 and 26.

Also involved are Federal Rules of Civil Procedure, Rules 42(a) and (b) and 54(b).

These statutory provisions and rules are set out in Appendix A to this petition.

STATEMENT OF THE CASE[3]

Los Angeles Memorial Coliseum Commission, a California public agency owning and operating a football stadium in Los Angeles, sued National Football League ("NFL") and its members for violating Sherman Act, § 1, by preventing the Coliseum from having any member club play in its stadium as a tenant. In early 1980, petitioner, one of the NFL defendants, then named Oakland Raiders, cross-complained against NFL and its other members (hereafter "NFL defendants" or "NFL appellants") for violating the Sherman Act in preventing the Raiders from moving to and playing home games in Los Angeles.

Under F.R.Civ.P. Rules 42(a) and (b), the trial was bifurcated, with a first trial to determine violation and liability and, if violation and liability were found, a second trial to determine amount of damages.

NFL appellants defended on the basis that they were a "single entity", incapable of conspiring among themselves, and also that they had committed and were committing no restraint of trade in preventing the Raiders from moving to Los Angeles and in refusing to let Raiders play home games there, and that the restraint was in any event not unreasonable under the Rule of Reason. In this connection, NFL appellants asserted that they, as a league, owned the right to play in Los Angeles and therefore could lawfully deny that right to any member.

In 1982 a jury verdict found that there was an unreasonable restraint of trade, and in June 1982 the district court entered a Final Decree against NFL defendants, both declaratory and injunctive. A copy of the Final Decree is attached as Appendix E.

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[3] All facts stated appear in one or the other of the two opinions, Appendices B and C.

This judgment declared that the conduct of the NFL defendants violated the Sherman Act, and it also provided:

> "The NFL and its member clubs are hereby permanently enjoined from interfering with, preventing or impeding the transfer of the Oakland Raiders' NFL franchise from the City of Oakland to the Los Angeles Memorial Coliseum."

The judgment was made final by the included determination under F.R.Civ.P. Rule 54(b) and was appealed and affirmed by the court below in February 1984. *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381. District Judge Spencer Williams, sitting by designation, dissented on the reasoning that NFL and its members were a single entity and collectively owned the right to play in any territory.

This Court denied certiorari, 469 U.S. 990 (Nov. 5, 1984).

Meanwhile, the judgment of the district court on liability not having been stayed, Oakland Raiders moved to Los Angeles in 1982 and became the Los Angeles Raiders. The damages phase of the action was then tried, and a jury returned a verdict for Raiders against the NFL defendants for $11,554,382 of single damages.[4] The NFL defendants appealed, and submission of the cause on appeal was deferred until this Court denied NFL's petition for certiorari to the decision in 726 F.2d.

Over 19 months after submission, the court below rendered the decision we now address. Its decision was unique, in that the court's opinion is pieced together from opinions by two of the three judges on the panel. The portion of the court's opinion written by Circuit Judge Nelson was unanimous and rejected *every* argument and contention made by the appellants (p. A-11 to A-17, *infra*). In this unanimous decision the court below held that the evidence and law fully supported the jury's finding that the Raiders had easily sustained damages in the amount of the verdict.

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[4] The jury awarded $4,860,000 single damages to the Los Angeles Memorial Coliseum Commission.

The second part of the court's opinion was by District Judge Spencer Williams, sitting by designation (pp. A-17, *et. seq., infra*). From this portion Circuit Judge Nelson dissented (pp. A-35 to A-45). Propounding a theory that no NFL appellant had advanced or argued on the damages appeal, Judge Williams held that the NFL was entitled to some sort of *offset*. As Judge Nelson describes the situation (p. A-42):

> "After liability attached, and the move [to Los Angeles] had been made, this court raised *sua sponte* the issue of whether to deduct the value of the district court's injunction (the value of the opportunity to play football in Los Angeles less the value of the opportunity to play football in Oakland) from the pre-trebled antitrust damages."[5] [Italics in original].

The court held that the case had to be remanded, not to review or retry the issue of the amount of damages, but to determine, in some unspecified way, whether an "expansion franchise" to play in Los Angeles was worth more than an "expansion franchise" to

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[5] This was done despite the Ninth Circuit's General Order No. 4.2, which provides:

> "If a panel determines to decide a case upon the basis of a significant point not raised by the parties in their briefs, it should give serious consideration to requesting additional briefing and oral argument before issuing a disposition predicated upon the particular point."

The minimum of the "fair hearing" required by due process under the Fifth Amendment is the opportunity to know the adverse case and to meet it. *Morgan v. United States*, 304 U.S. 1, 15, 18, 19 (1938); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Yet, by a 2 to 1 vote, the court ordered reversal on the damages issue, on the basis of a point or theory *never raised* by any appellant in that court, and of which Raiders had never heard.

Appellants have been represented by an array of the most eminent counsel in the United States, Messrs. Covington & Burling of Washington, Messrs. Sullivan & Cromwell of New York, Messrs. O'Melveny & Myers of Los Angeles, and Messrs. Kirkland & Ellis of Chicago. Not one of them had ever thought of the argument on which Judge Williams' opinion rests as relevant to damages.

play in Oakland, and, if it should be found that it was, then the NFL was entitled to an offset of the "excess value" against the amount of the damages theretofore correctly determined, the offset to be made before trebling of the damages.

Judge Williams' opinion does not make clear who is supposed to be the owner of the right to play in Los Angeles or of the "excess" value, whether it was all the member clubs of the League in some unspecified or inchoate capacity, or the NFL, an unincorporated association, itself. The words of the opinion are: "The value of the league's expansion opportunities belonged to the league as a whole, or in other words, was owned in part by each franchise owner" (p. A-26, lines 1-3). Whatever it was, Judge Williams' reasoning was a different way of expressing precisely the contention on which he had unsuccessfully dissented from the previous decision of liability, *viz.*, that NFL and its members are an "entity", and that the right to play football in the National Football League in Los Angeles is property of that "entity" for which it can charge a price to any member wishing to move. In its unsuccessful petition to this Court for certiorari NFL had urged (p. 13): "With respect to team location, the members of a league function as a single firm deciding where its business is to be located." In NFL's reply brief in the Court below on the liability appeal it summed its position thus (p. 21):

> "The question in this case is simply whether the Sherman Act limits the right of the members of this lawful League to act jointly in choosing the *League's places of business* by requiring them to foster member vs. member competition for local fan support."

The contention then was that the League or its members somehow owned the territories in which football could be played. Rejected by the court of appeals, denied review by this Court, the proposition was not reasserted on the appeal from the damage verdict by any of the appellants but was re-presented by Judge Williams in new guise. What Judge Williams' opinion did on the damages appeal was to bring in through the back door what the court had previously rejected at the front door.

In the prior decision on liability, the following was *adjudicated* and set to rest: (1) The National Football League and its members are not a single entity. (2) They conspired to restrain trade and commerce and did restrain it, by excluding petitioner Raiders from Los Angeles and that restraint was unreasonable under the Rule of Reason standard. (3) The Raiders were entitled to recover damages for the injury suffered by reason of the exclusion that had theretofore occurred. (4) In addition, Raiders were entitled to a final injunction against further exclusion, and that injunction issued.

Yet, now, on appeal from the later judgment assessing and awarding damages, the court orders an "offset", before trebling, against the damages resulting from past unlawful restraint in an amount measured by some "value" of the right to be free of the restraint in the future.

This is the unique and novel position at the base of what the Court is now being respectfully asked to review.

REASONS FOR GRANTING THE WRIT

Important questions of law are presented which deserve this Court's review. Not only will the remarkable reasoning of the court below be seized upon to emasculate private antitrust enforcement in a way both portentous and frightening, but the decision goes beyond the antitrust area.

A. Beyond the Antitrust Area. The Decision Undermines F.R.Civ.P. Rules 42(a) and (b) and 54(b).

We first point out how the decision goes beyond antitrust. It flouts *res judicata* principles.

An important issue presented to the Court for review is whether F.R.Civ. P. Rules 42(a) and (b) and 54(b) are to be eviscerated. Both rules exist to facilitate an efficient administration of justice. To that end Rules 42(a) and (b) permit severance for trial of separate issues, and bifurcation of trials for liability and damages is now frequent. As said in 9 Wright & Miller, Federal Practice & Procedure, § 2390, p. 296, "Separation of issues of liability from those relating to damages is an obvious use for Rule 42(b)". To

the same end of efficiency of administration of justice, Rule 54(b) allows a trial court to confer finality on the outcome of a separate trial under Rule 42(b), thus makes it immediately appealable, and thereby confers finality on an affirmance of that judgment on appeal. A major consequence is *res judicata.* 10 Wright & Miller, § 2661, p. 128. The decision below emasculated these principles and purpose. That fact alone, we submit, calls for review and correction.

The prior decision on the liability appeal was not a narrow one that Raiders were entitled to be in Los Angeles on condition that it pay a price to NFL. The injunction was not limited to enjoining NFL from keeping the Raiders out of the Coliseum if and when the Raiders are willing to pay a price. The adjudication that the Raiders was entitled to be in the Los Angeles Coliseum was unconditional and not limited in time. The injunction was absolute and not temporary. The decision that the NFL could not lawfully keep the Raiders out of the Los Angeles Coliseum did not mean that NFL could charge the Raiders for letting it in.

Judge Williams' opinion was aware that it was inconsistent with the injunction which, over his dissent, the court had sustained in 1984. Indeed, the opinion *rests* upon the inconsistency, by characterizing the injunction as having gone too far. It was, the opinion asserts, "overbroad injunctive relief" (p. A-27, line 3). Enjoining NFL from keeping Raiders out of Los Angeles was an "*excess* portion of the injunctive relief" (p. A-27, lines 16, 17). The district court, the opinion states, is to "calculate the value of the Raiders' injunctive relief that *exceeded* the scope of the liability verdict" (p. A-27, lines 33, 34). Again, it states, the Raiders' damages "must be reduced by the value of the injunctive relief awarded by the district court which *exceeded* the scope of the liability verdict" (p. A-31, lines 4, 5). And, again (p. A-31, lines 33-35), the liability *verdict* gave Raiders certain rights, but the injunction erroneously "also gave them [Raiders] the 'value of the business'—the excess value of the Los Angeles opportunity for which the NFL could have legitimately charged them."

This is extraordinary law for *judgments, not verdicts, adjudicate rights.* If a judgment exceeds what a verdict justifies, it would be erroneous and reversible. By affirming in 1984, the court below

adjudicated that the judgment did *not* exceed the verdict, was not "overbroad", was specific (F.R.Civ.P. 65(d)), and correct. Judge Williams' opinion retools a *judgment* that entitles Raiders to be in Los Angeles, *without paying any price to NFL*, into a narrower one.

In *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), the Court granted certiorari to the Ninth Circuit and reversed for failure to respect *res judicata*. It reminded the court below of basic doctrine that "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action" (p. 398), and that " '[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties' " (p. 401). In *Moitie* the Ninth Circuit refused to apply *res judicata* in order to permit victims of wrongdoing to sue. In this case it has ignored *res judicata*, in order to deny the victim the damages a jury has awarded it.

If the prior decision had been in a different case, its binding effect, as *res judicata*, would be beyond dispute. *Res judicata* would conclusively establish that the injunction was not "overbroad" or "excessive", and no court could now require Raiders to pay NFL a price for exercising the rights the injunction gave it.

The question is: Can *res judicata* effect be denied because the final judgment was in the *same* case as a result of use of the efficiencies of Rules 42(b) and 54(b)? If so, a different panel of the court of appeal assigned to hear an appeal from the judgment rendered on the second trial of a bifurcated case would be free to overrule the decision of the panel that heard the appeal from the first judgment. This is not efficiency, but anarchy. We submit that the answer must be that *res judicata* effect cannot be denied and that certiorari should be granted in order to say so.[6]

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[6] The opinion contains a statement (p. A-5) that the appeal was taken under 28 U.S.C. § 1292(a)(1). The notice of appeal stated that the appeal was taken from the injunction (which § 1292(a)(1) would allow). Raiders filed a motion to dismiss or affirm on the ground that no

B. In the Antitrust Area.

This case does not involve a *Hanover Shoe* type of issue (*Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968)). A situation comparable to *Hanover Shoe* would be one where, by moving to Los Angeles, the Raiders saved some expense it would have incurred had it stayed in Oakland; no one claimed that situation, and the court below postulated none.

The court below purported to find support in *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9 Cir. 1971) *cert. denied*, 405 U.S. 955 (1972)). In that case, for a single consideration, a franchisor sold goods and licensed trademarks and know-how. It being a tying case, by definition it involved defendant's ownership of two different properties. The fact that the tying requirement was illegal did not entitle the purchaser to have the license free, for the trademark and know-how were indisputably the franchisor's property for which it was entitled to make a charge. To apply *Chicken Delight* to this case required a gigantic leap to the assumption that NFL owns all locations in the United States for playing football. That this is indeed the basis of the decision is summed up in these words of Judge Williams' opinion (p. A-25, line 20):

> "[T]he NFL as a whole owned the right to expand into the Los Angeles area."

Thus the whole foundation of the decision is the premise that the right of a member to play in Los Angeles was the property of NFL, the very premise that the court had rejected on the liability appeal and which NFL unsuccessfully proffered to this Court

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appeal had been taken from the remainder of the judgment, particularly the declaration of illegality, and that therefore it was not open to appellants to contend that their prevention of the Raiders from transferring to Los Angeles did not violate § 1 of the Sherman Act. The motion to dismiss was denied after NFL's response that, under rules of liberal construction, the notice was an appeal from all portions of the final judgment. Of course, it could be so treated only by virtue of the Rule 54(b) determination. Moreover, it is irrelevant whether the appeal was under Rule 54(b) or § 1292(a)(1), for in either event the subsequent affirmance constituted a *res judicata*.

when it sought certiorari and, as we note in part 4 below, which Congress had refused to sanction.

It may be noted the case does not involve any issue about "expansion franchises". "Expansion franchise" is sports terminology for admitting a new member into the sports league, and admission of a new member is merely to enter into a contract with a party to participate in the playing of the sport. This case concerns the imposition of "territorial exclusivity" upon present members, not admission of new members.

1. The Decision Below Errs in Compelling the Victim of an Antitrust Violation To Elect Between Damages and an Injunction.

The Clayton Act confers on the victim of an antitrust violation *two* remedies, not one. Section 4 (15 U.S.C. § 15) confers the right to damages. Section 16 (15 U.S.C. § 26) confers the right to injunction against future violation (cf. *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). The single damages of $11,554,382—which the court below held to be supported by the evidence and the law—are the damages inflicted on the Raiders by NFL's keeping it out of Los Angeles from the time Raiders sought to move early in 1980 until entry of the injunction in 1982, whereupon the NFL ceased to prevent the move. *The injunction did not overlap the damages.* Injunctions, a creature of equity, look to the future (*Bitterman v. Louisville & N.R. Co.*, 207 U.S. 205, 227 (1907)). "Law", as distinguished from "equity", can only award damages and only for acts already committed. In doing so, "law" determines the damages that have accrued in the past and, also, the damages that will continue to accrue from the acts already committed. *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 339 (1971).

If *no* injunction against future conduct issues, a defendant can thereafter continue on its course free of fear of contempt but at risk that the victim of past unlawful conduct may, if it chooses, again sue for damages for the later acts. *An injunction is an alternative of damages caused by future acts, not an offset against damages from past acts.*

The decision below overrides the Clayton Act by requiring a plaintiff to *elect* between damages and an injunction, to imperil the extent of its right to damages for past injury if it wishes prophylactic protection against injury from future acts. It compels the victim to waive the protection of the law for the future if he wishes to preserve full damages for the past.

If the injunction were "overbroad" as the court below *now* holds, it should have so held in its decision on liability in 1984. If it had then stated that Raiders could not have both the injunction and all the damages for NFL's past unlawful conduct, Raiders could then have elected the full damages the jury awarded, trebled, and waived the injunction, reserving the right to sue for damages in the future if NFL still denied it the right to be in Los Angeles. The duty to choose at its peril whether to order the Raiders back to Oakland or to allow it to continue to be in Los Angeles would thus have been on the NFL. In a new suit, NFL would be free to claim that under the facts then existing there no longer was a violation. These could be the only alternatives. There could not be a third scenario, whereby NFL could claim to be bound by an improper "overbroad" injunction and yet deduct payment for the "overbreadth" from damages for past injury.

The present decision of the court below, by discrediting its prior decision, has "sandbagged" Raiders. As Judge Nelson observed (p. A-41, fn. 9):

> "One can appreciate the fairness of offsetting after trebling in the present case by examining the implications of a slight variation of the facts. What if the Raiders had not sought injunctive relief? In that case, there would be no question of offsetting the value of an equitable remedy. First, the Raiders would receive three times their actual antitrust damages (*i.e.*, three times the lost financial advantages between 1980 and 1982). Only afterwards would the court prevent the ongoing antitrust violation by prohibiting the restraint of the move, but permitting the NFL to charge the Raiders for the value of the move."[7]

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[7] Instead of being "overbroad", the injunction was narrow. It was restricted to a transfer of Raiders "from the City of Oakland to the Los

Moreover, the opinion below nowhere tells why the injunction was "overbroad". It nowhere tells why excluding the Raiders from Los Angeles in 1980-82 was an unlawful restraint of trade but excluding them thereafter would not be equally unlawful. Another panel of the same court recently, in *National Basketball Association, et al. v. SDC Basketball Club, Inc. and Los Angeles Memorial Coliseum Commission*, 815 F.2d 562 (April 21, 1987), expressed puzzlement about this very holding (we describe that case in part 3 below.)

2. The Decision Permits the Violator of Antitrust Law to Charge the Victim a Price for Discontinuing the Violation and Conflicts with Randall v. Loftsgaarden, 478 U.S. , 92 L.Ed.2d 525 (1986).

Judge Williams' opinion creates the concept of a charge for relocation. But denial of relocation was adjudicated to be a restraint of trade. To exact payment for refraining from a restraint is itself a restraint.

The difference in value to the Raiders between being in Los Angeles at the Los Angeles Coliseum and being in Oakland is merely a function of the difference in earning power at the two locations. The amount of the damages inflicted upon the Raiders by being denied the right to move until the injunction issued in 1982 was an expression of loss of earning power. To offset against the damages is to deny the damages. Thus the decision comes to this: Where one has been *unlawfully* deprived of a valuable

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Angeles Memorial Coliseum", not to "Los Angeles" (Appendix E). The Coliseum's claim was that NFL had unlawfully denied it the right to have Raiders at the Coliseum and obtained an injunction against the NFL's preventing it from having the Raiders at the Coliseum. That injunction was affirmed, and this Court denied certiorari. The present decision deprives the Raiders of the treble damages authorized by Congress and awarded by the jury for past injury, simply because Raiders are permitted by the injunction to play at the Coliseum in the future. But the reason Raiders can play in the Coliseum in the future is that the court below affirmed an injunction that guarantees the Coliseum's right to have the Raiders there. Erase the injunction in favor of the Raiders entirely, and Raiders would still be at the Coliseum by virtue of the Coliseum's injunction.

opportunity, the value of that opportunity is to be offset against the damages flowing from being deprived of the opportunity!

There is an escape for NFL from this contradiction, but it leads into a cul-de-sac. The escape is to say that what is offset against the damages for past unlawful conduct is not the value of what was unlawfully denied to the victim but the value of what the injunction prevents NFL from denying in the future. But, unless *res judicata* is sacked, denial in the future is also unlawful.

The oddity cannot be escaped by saying that a court, not NFL, will determine the price to be paid. Such a procedure would convert an antitrust action into a kind of eminent domain proceedings whereby a sports club can condemn and take from a sports league a right to move by paying "just compensation" to the league, with the "just compensation" to be determined by a court. Or it would convert the courts into rate-fixing tribunals supervising football as a public utility! No doubt Congress can create that kind of structure, and it has been asked to do so by bills tendered to it (see part 4 below). But a court should not.

The decision conflicts with the rationale of this Court's recent decision in *Randall v. Loftsgaarden*, 478 U.S. , 92 L.Ed.2d 525, 542 (1986). Investors in a limited partnership recovered against a promoter on claims of securities fraud under certain sections of the 1933 and 1934 Acts. The Eighth Circuit held that damages awarded for a violation of either Act had to be reduced by the amount of federal income tax benefits received from the investment because the 1934 Act expressly limited recovery to "actual damages" and the 1933 Act was substantially equivalent. This Court reversed, holding that the damages were not reducible by the amount of federal income tax benefits received either as an offset for "income received" or as a return of "consideration". It said (92 L.Ed.2d 542):

> "Respondents also overlook the fact that Congress' aim in enacting the 1934 Act was not confined solely to compensating defrauded investors. Congress intended to deter fraud and manipulative practices in the securities markets, and to ensure full disclosure of information material to investment decisions. [Citations omitted.] This deterrent purpose is ill-

> served by a too rigid insistence on limiting plaintiffs to recovery of their 'net economic loss.' [Citation omitted.] The effect of allowing a tax benefit offset would often be substantially to insulate those who commit securities frauds from any appreciable liability to defrauded investors. The resulting diminution in the incentives for tax shelter promoters to comply with the federal securities laws would seriously impair the deterrent value of private rights of action, which, we have emphasized, 'provide "a most effective weapon in the enforcement of the securities laws and are a "necessary supplement to Commission action." ' [Citation omitted.]"

Randall's words are doubly applicable to the Sherman Act. It is just as important for the Court to say so now, in the antitrust context, as it was to grant certiorari in order to say so in the securities context. The quotation from *Randall* is but an echo of what the Court has frequently said earlier about antitrust law. For example, in *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 130-131 (1969):

> "Moreover, the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws."

Similarly, in *Fortner Enterprises v. U.S. Steel Corp.*, 394 U.S. 495, 502 (1969) the Court said:

> "As the special provision awarding treble damages to successful plaintiffs illustrates, Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition."

So also, *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972).

3. By Directing that the "Offset" Be Made Before Trebling the Jury's Damages, the Decision Conflicts with Congress' Purpose in Providing for Trebling.

The decision makes a grievous precedential inroad on widely accepted law that offsets are applied *after* trebling, not before. Review by this Court is called for in order that there be a

definitive pronouncement on the subject. As shown in the careful review in Judge Nelson's dissenting opinion (p. A-41 to 45), until now it has been universally accepted in all the circuits that amounts paid in settlement by co-conspirators are deducted after trebling (p. A-42, 43).

> "[T]he antitrust laws provide that the plaintiff should receive three times the actual antitrust damages. If a court deducts settlement proceeds before trebling, the plaintiff's total award would be less than what the law requires. Second, Congress designed the antitrust laws to encourage suits by private plaintiffs. Offsetting before trebling would diminish the statutory incentive through judicial construction." (p. A-43)

What is true of an offset for settlement is true of offset for a counterclaim, as for the unpaid price of goods purchased, *Jerard Associates Inc. v. Stanley Works*, 1966 Trade Cases ¶ 71,820 (SDNY), where the court said: "Plaintiff is entitled to treble damages; defendant is not. We see no reason in law or justice why we should emasculate the treble damage provision by artificially trebling defendant's counterclaim .... The purpose of the treble damage provision requires that any set-off to an antitrust judgment be deducted after trebling because a narrow construction of § 4 would do violence to the congressional purpose of aiding the enforcement of the antitrust laws by providing an incentive for private antitrust actions ...." As Judge Nelson pointed out (pp. A-44, 45), the emergency price control acts of World War II provided for treble damages to tenants for landlords' violation of rent ceilings, and offset for unpaid rent was made only after first trebling the damages. The analogy is exact.

Where a law has a punitive component or objective, as it does in trebling compensatory damages, any offset must be made after actual damages are trebled; otherwise that objective is not served.

> In all cases "the governing principle is that the court should *separately* assess all offsets which are not related to the pretrebled damage calculation. That is, offsets which do not flow from the violation itself should be deducted *after* trebling." [Emphasis in original.] (p. A-42)

Here the offset ordered is of the so-called "value of the opportunity to play football in Los Angeles less the value of the opportunity to play football in Oakland" (p. A-42). Such a value, *if* it exists, does not flow from the violation itself. In a recent antitrust sports case, *National Basketball Association, et al. v. SDC Basketball Club, Inc. and Los Angeles Memorial Coliseum Commission*, 815 F.2d 562, 570 (April 21, 1987), the Ninth Circuit, referring to the very offset decision of the present case, was positive that the source of the right to an offset was not in antitrust law, saying:

> "The majority in *Raiders II*, however, found only that the expansion opportunity taken by the Raiders in their move to Los Angeles limited the Raiders' recovery of antitrust damages. The majority revealed nothing about the origin of that offset. Therefore, the *existence* of a recovery for expansion opportunity must find its source somewhere other than antitrust law . . . . " [Emphasis in original]

Clearly, the offset does not arise from any antitrust principle. Therefore it should be made, if at all, only after trebling. Otherwise the effect is to treble the offset; yet nothing in any antitrust statute provides for trebling an offset so as to diminish the victim's recovery. To treble the offset *rewards* the law violator for its violation. As Judge Nelson observes (p. A-41), "By offsetting before trebling in order to compensate the NFL for the lost value of the injunction, the majority effectively requires the Raiders to pay the League three times the value of an opportunity that was only *once* received" [emphasis in original]. And again (fn. 9, p. A-41),

> "The amount to which the NFL was entitled incident to the move, improperly conferred upon the Raiders, can be *returned*; but to return this amount, the Raiders need only return it *once*, *after* trebling. Offsetting before trebling would result in a *treble* return for an improper remedy that was only *once* received. [Emphasis in original.]"

It may be added that the remedy could be considered "improper" only by refusing *res judicata* effect to the prior decision on liability.

4. The Decision Has Granted to Professional Sports Leagues the Very Immunity from the Antitrust Laws that Congress Has Repeatedly Been Asked To Grant and Has Consistently Denied.

The decision below not only creates the concept of ownership of rights of relocation of its members, but also places that ownership in the unincorporated National Football League, as some sort of whole. Yet NFL is merely a convenient name given to the network of contractual relations of the member clubs who have entered into agreements to play football with each other. In Raiders' brief in opposition to NFL's petition for certiorari to the liability decision in 1984, Raiders quoted provisions of NFL's "constitution and bylaws" showing that it had no business of its own; Article II, Rule 2.1, stated that both the purpose and objects for which the League was organized are:

> "(a) To promote and foster the primary business of League members, each member being an owner of a professional football club located in the United States."

From the beginning, the league agreement contained provisions to preserve the monopoly of each member of its own area, to give each "territorial exclusivity" by assigning ownership of a particular territory to each, to protect each from competition of any other. Those provisions were adopted when NFL thought that football was immune from the Sherman Act. When this Court disabused NFL of that misconception (*Radovich v. National Football League*, 352 U.S. 445 (1957)), NFL unsuccessfully asked Congress to legalize these very rules. NFL's commissioner told Congress in 1958 that the purpose of the rules was to protect each club from competition, from "territorial invasion".[8] Congress refused to grant the exemption. In 1964 NFL again asked Congress for an exemption of its territorial rules and sought

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[8] Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 85th Congress, Second Session, on Organized Professional Team Sports, July 1958, at pp. 392-399.

enactment of S. 2391.[9] NFL urged on Congress (p. 112) that the member clubs of a professional football league should be deemed a form of partnership, with the commissioner acting as the presiding officer. The bill died in committee. It was re-presented in 1965 as S. 950[10] with the same arguments (p. 198). Again, Congress did not grant the exemption.

In 1966, when NFL obtained exemption from Congress for merger with AFL, it assured Congress that the bill would not grant the exemption refused by Congress in 1964 and 1965 and that NFL would still have to answer under the Sherman Act in all other respects and particularly as respects the very rules about territorial rights and removal of clubs.[11]

After the Raiders sought to move to Los Angeles in early 1980, numerous bills were introduced to regulate the subject of professional team relocation. Some would lay down a set of objective guidelines (*e.g.*, H.R. 823 and H.R. 3287, introduced in 1981). Others would set up a regulatory administrative agency (*e.g.*, "Sports Competition Act of 1983", introduced on May 23, 1983, as H.R. 3094, and H.R. 3944 introduced on September 21, 1983). NFL opposed these bills, for it wanted free license left in its own hands. The bills NFL itself proposed or supported would do just that, such as H.R. 6467, introduced in the 97th Congress, Second Session, on May 21, 1982, and H.R. 2041 introduced in 1983.[12] A

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[9] Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 88th Congress, Second Session, on "Professional Sports Antitrust Bill—1964".

[10] Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 89th Congress, First Session, "Professional Sports Antitrust Bill—1965".

[11] Hearings of the Antitrust Committee of the House Committee on the Judiciary on S. 3817, "Professional Football League Merger".

[12] "Oversight Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, Ninety-Seventh Congress, First and Second Sessions, on H.R. 823, H.R. 3287, and H.R. 6467, Antitrust Policy and Professional Sports" Serial No. 114.

similar bill was introduced in the Senate on July 28, 1982, as S. 2784; another similar bill was introduced as S. 2821.[13] The deluge of bills continued into the 98th Congress in 1984, with H.R. 5388, on April 5, 1984, and H.R. 5430, entitled "Professional Sports Team Community Protection Act", on April 11, 1984.

No bill emerged from Committee. That fact shows that Congress was yet to be convinced that the interests of the nation are served by recognizing ownership by professional sports leagues of "territory".

No member club is going to move its location to another city if the additional profits it will make from the relocation have to be paid to the sports league. To allow the league to place a toll on moving is to prevent moves entirely and thus to give the NFL, through the guise of a newly conceived rule of "offset" damages, that very power to preserve "territorial exclusivity", *which is the precise conduct held to be unlawful* by the courts when directly presented, and what Congress has steadfastly refused to give.

CONCLUSION

The impact of the decision below is far wider than professional football; it interferes with administration of justice under F.R.Civ.P. Rules 42(a) and 54(b) and with *res judicata*.

But even were it conceived to apply only to the NFL, it would warrant review by this Court, for professional football is the bellwether of professional sports not blessed with baseball's immunity from antitrust, and professional sports have become a substantial part of American life. The Antitrust Section of the American Bar Association has just set up a subsection on antitrust in sports, and treatises are written on the subject.[14]

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[13] "Hearings Before the Committee on the Judiciary, United States Senate, Ninty-Seventh Congress, Second Session", Serial No. J-97-134, on "Professional Sports Antitrust Immunity".

[14] E.g., Weistart and Lowell, "The Law of Sports" (Bobbs Merrill, 1979) which contains 300 pages of discussion of "Antitrust Aspects of Sports".

The subtle and acute distinctions inherent in antitrust law are ceaselessly parsed by an ever ingenious bar. Decisions whose origins and reasoning are mysterious, or whose exposition is not expressed with logical purity, engender extreme contentions and unexpected results in subsequent litigation. Even decisions expressed with lucidity and founded on a true perception of antitrust rather than on verbal niceties are followed by a vast progeny. *A fortiori*, a decision like that below, which springs out of nowhere and rests on a variety of unstated and erroneous premises, should be subjected to the Court's scrutiny before proliferating. Long ago, this Court endorsed the principle expressed in the phrase "*obsta principiis*"—withstand beginnings.[15] That principle speaks here.

We respectfully submit that a writ of certiorari should issue.

Dated: San Francisco, California, June 8, 1987

*MOSES LASKY
LASKY, HAAS, COHLER & MUNTER

JOSEPH L. ALIOTO
ALIOTO & ALIOTO
Attorneys for Petitioner
Los Angeles Raiders

**Counsel of Record*

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[15] *Monongahela Navigation Company v. United States*, 148 U.S. 312, 324 (1893); *Boyd v. United States*, 116 U.S. 616, 635 (1886).

Appendix A

Statutes and Rules Involved

Sherman Act, Act of July 2, 1890, c. 647, 26 Stat. 290, § 1, as amended, 15 U.S.C. § 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

Clayton Act, Act of October 15, 1914, c. 323, § 4, 38 Stat. 731, as amended, 15 U.S.C. § 15:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Clayton Act, Act of October 15, 1914, c. 323, § 16, 38 Stat. 731, as amended, 15 U.S.C. § 26:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . ."

Federal Rules of Civil Procedure, Rule 42(a) and (b):

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the

actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Federal Rules of Civil Procedure, Rule 54(a) and (b):

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Appendix B

United States Court of Appeals
for the Ninth Circuit

Nos. 83-5907, 83-5908, 83-5909
DC No. CV 78-3523-HP

Los Angeles Memorial Coliseum Commission,
Plaintiff-Appellee,

vs.

National Football League, an unincorporated association, Baltimore Football Club, Inc. (Baltimore Colts), Buffalo Bills, Inc., Chargers Football Co. (San Diego Chargers), Chicago Bears Football Club, Inc., Cincinnati Bengals, Inc., Cleveland Browns, Inc., Dallas Cowboys Football Club, Inc., Detroit Lions, Inc., Five Smiths, Inc. (Atlanta Falcons), Green Bay Packers, Inc., Houston Oilers, Inc., Kansas City Chiefs Football Club, Inc., Los Angeles Rams Football Co., Miami Dolphins, Ltd., Minnesota Vikings Football Club, Inc., New England Patriots Football Club, Inc., New Orleans Saints Louisiana Partnership, New York Football Giants, New York Jets Football Club, Inc., Philadelphia Eagles Football Club, Inc., Pittsburgh Steelers Sports, Inc., Pro-Football, Inc. (Washington Redskins), EFK Sports, Ltd., sued herein as Rocky Mountain Empire Sports, Inc. (Denver Broncos), St. Louis Football Cardinals Co., San Francisco Forty-Niners, Seattle Professional Football (Seattle Seahawks), and Tampa Bay Area NFL Football, Inc. (Tampa Bay Buccaneers),

Defendants-Appellants.

Oakland Raiders, Ltd.,
Cross Claimant-Appellee,

vs.

National Football League,
an unincorporated association, et al.,
Cross Defendants-Appellants.

OPINION

[Filed June 16, 1986]

Appeal from the United States District Court
For the Central District of California
Hon. Harry Pregerson, Circuit Judge, sitting by designation

Argued: October 5, 1984 —San Francisco, California

Submitted: November 8, 1984

Before: Anderson and Nelson, Circuit Judges, and S. Williams, District Judge.*

Nelson, Circuit Judge:

We now face the second and concluding set of appeals from the district court litigation concerning the move by the Oakland Raiders professional football team (the "Raiders") from Oakland, California to Los Angeles, California. In our earlier opinion, *Los Angeles Memorial Coliseum Commission v. National Football League,* 726 F.2d 1381 (9th Cir.), *cert. denied,* ____ U.S. ____, 105 S. Ct. 397 (1984) ("*Raiders I*"), we affirmed the judgment of antitrust liability against the National Football League and its member clubs ("NFL," the "League"). Here, we (1) affirm the trebled damage jury verdict in favor of the Coliseum; (2) vacate the Raiders' antitrust damage recovery, and remand for further proceedings; and (3) reverse the judgment of liability and damages on the claim for breach of the implied promise of good faith and fair dealing.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts which precipitated this litigation are summarized in our earlier opinion. 726 F.2d at 1384-86.

After an initial hung jury and mistrial, the trial in this case was bifurcated. In the first portion, the jury, in separate verdicts in May 1982, found the NFL and its member clubs liable to the Los Angeles Memorial Coliseum Commission (the "Coliseum")

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* The Honorable Spencer M. Williams, United States District Judge for the Northern District of California, sitting by designation.

and the Raiders for antitrust violations of section 1 of the Sherman Act, 15 U.S.C. § 1, and to the Raiders for breach of the covenant of good faith and fair dealing implied under California law into the NFL Constitution and By-Laws (the "contract"), to which all NFL clubs are parties.

An injunction was issued in June 1982 by the district court in accordance with the antitrust liability judgment and section 16 of the Clayton Act, 15 U.S.C. § 26. This order, along with the underlying antitrust liability issues, was immediately appealed to this panel as an interlocutory order, pursuant to 28 U.S.C. § 1292(a)(1).

The damages portion of the trial commenced in September 1982. At the trial's conclusion in May 1983, the jury awarded damages on both claims, as follows: for the Coliseum, antitrust damages of $4,860,081, trebled by the district court pursuant to 15 U.S.C. § 15 to $14,580,243; for the Raiders, antitrust damages of $11,554,382, trebled to $34,663,146, plus contract damages stipulated by the parties to equal in amount the untrebled antitrust damages, $11,554,382.

Judgment on the contract liability, which had not been entered after the liability portion of the trial, was entered after the damages phase. At that time it merged into the final judgment, which is being appealed here. *See Munoz v. Small Business Administration,* 644 F.2d 1361, 1364 (9th Cir. 1981) ("[A]n appeal from the final judgment draws in question all earlier non-final orders and all rulings which produced the judgment."). Hence, we now review the judgment of contract liability on the implied promise of good faith and fair dealing, as well as both the antitrust and contract damages.

Following our *Raiders I* decision in February 1984 affirming the district court judgment of antitrust liability, appellants filed a petition for certiorari with the Supreme Court. We then proceeded with the briefing and oral argument for this second set of appeals, but withdrew the case from submission pending the Supreme Court's response. On November 8, 1984, the case was resubmitted, after the Court's denial of the petition.

STANDARDS OF REVIEW

The district court denied the NFL's motions for directed verdict and for judgment notwithstanding the verdict on various issues and sub-issues now before us. We apply the same standard of review to each of these two types of ruling, and our inquiry is identical to that of the district court: viewing the evidence as a whole and in the light most favorable to the nonmoving party (the Raiders, the Coliseum), does substantial evidence support the jury's verdict or, on the contrary, is the only reasonable conclusion that can be drawn from the evidence that the moving party (the NFL) is entitled to judgment as a matter of law? *E.g., Garter-Bare Co. v. Munsingwear Inc.*, 723 F.2d 707, 709 (9th Cir.), *cert. denied*, ____ U.S. ____, 105 S. Ct. 381 (1984); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1026 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); *California Computer Products v. IBM*, 613 F.2d 727, 732-34 (9th Cir. 1979). We may not weigh the evidence and impose a result we find to be preferable as long as the jury's verdict is supported by substantial evidence. *William Inglis & Sons*, 668 F.2d at 1026.

We review *de novo*, however, questions of law, *e.g., United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, ____ U.S. ____, 105 S. Ct. 101 (1984), as well as the district court's determination and application of state law. *E.g., Fiorito Bros. v. Fruehauf Corp.*, 747 F.2d 1309, 1312 (9th Cir. 1984).

In reviewing jury instructions to which timely objections were made, we ask

> whether, viewing the jury instructions as a whole, the trial judge gave adequate instructions on each element of the case to insure that the jury fully understood the issues. [Citations.] A court is not required to . . . amplify an instruction if the instructions as given allowed the jury to determine intelligently the issues presented.

Raiders I, 726 F.2d at 1398. "A trial judge is given substantial latitude in tailoring the instructions so long as they fairly and adequately cover the issues presented" when "evaluated in the context of the whole trial." *United States v. Marabelles*, 724 F.2d

1374, 1382-83 (9th Cir. 1984). A party is not entitled to an instruction on its theory of the case if that theory lacks support either in law or in the record. *E.g., Raiders I,* 726 F.2d at 1398; *United States v. Candelaria,* 704 F.2d 1129, 1132 (9th Cir. 1983).

In reviewing a jury's damages award, its "finding of the amount of damages must be upheld unless the amount is 'grossly excessive or monstrous,' clearly not supported by the evidence, or 'only based on speculation or guesswork.' " *Handgards, Inc. v. Ethicon, Inc.,* 743 F.2d 1282, 1297 (9th Cir. 1984) (quoting *Blanton v. Mobil Oil Corp.,* 721 F.2d 1207, 1216 (9th Cir. 1983), *cert. denied,* ____ U.S. ____, 105 S. Ct. 1874 (1985)), *cert. denied,* ____ U.S. ____, 105 S. Ct. 963 (1985). In antitrust cases, a lesser level of proof is needed to support the amount of damages than to support the fact of antitrust injury; in applying this "liberal proof of damages standard," we have required only that the plaintiff provide sufficient evidence to permit a "just and reasonable estimate of the damages." *Id.; see generally J. Truett Payne Co. v. Chrysler Motors Corp.,* 451 U.S. 557, 565-68 & n.5 (1981).

DISCUSSION

I. IMPLIED PROMISE OF GOOD FAITH AND FAIR DEALING (RAIDERS)

As recently reiterated by the California Supreme Court, "[i]t is well settled that, in California, the law implies in *every* contract a covenant of good faith and fair dealing." *Seaman's Direct Buying Service v. Standard Oil Co. of California,* 36 Cal. 3d 752, 768, 686 P.2d 1158, 1166, 206 Cal. Rptr. 354, 362 (1984) (en banc); *see also, e.g., San Jose Production Credit Association v. Old Republic Life Insurance Co.,* 723 F.2d 700, 703 (9th Cir. 1984). This covenant not only "requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement," *id.,* "but also [imposes] the duty to do everything that the contract presupposes that he will do to accomplish its purpose." *Berkeley Lawn Bowling Club v. City of Berkeley,* 42 Cal. App. 3d 280, 286-87, 116 Cal. Rptr. 762, 766 (1974) (quoting *Harm v. Frasher,* 181 Cal. App. 2d 405, 417, 5 Cal. Rptr. 367, 374 (1960)). Even where one party retains,

by virtue of the contract, a right of approval or disapproval or a discretionary power over the rights of the other, such powers must be exercised "within the parameters of the duty of good faith." *See Larwin-Southern California, Inc., v. JGB Investment Co.*, 101 Cal. App. 3d 626, 639-40, 162 Cal. Rptr. 52, 59 (1979); *see also Seaman's*, 36 Cal. 3d at 776, 686 P.2d at 1171-72; 206 Cal. Rptr. at 367-68 (Bird, C.J., concurring and dissenting) (good faith requires that each party act "reasonably" in light of the "justified expectations" of the other party).

Most important for the present case, this implied promise of good faith and fair dealing is "reciprocal," a "two-way street" which demands mutual compliance from the contracting parties. *E.g., Commercial Union Assurance Companies v. Safeway Stores*, 26 Cal. 3d 912, 918, 610 P.2d 1038, 1041, 164 Cal. Rptr. 709, 712 (1980).

The district court provided a clear and concise statement of these principles in its jury instructions on the contract liability issue, and also instructed that "[i]f both parties have breached this implied promise, neither can recover on it." The jury then found defendants liable for breaching the implied covenant.

We cannot find the jury's verdict on this issue to be supported by substantial evidence, and consequently must reverse the district court's decision denying judgment n.o.v. The evidence presented in this case, taken as a whole, permits only one of two conclusions: either (1) neither the Raiders nor the NFL breached the duty of good faith with respect to the contemplated franchise move from Oakland to Los Angeles, or (2) both parties so breached. Either way, the Raiders may not recover under the implied covenant. The jury's implicit conclusion, that the NFL failed to act in good faith when it refused to authorize the Raiders' relocation but that the Raiders did act in good faith with respect to this issue, is not a reasonable one to be drawn from the evidence, and we find it to be untenable as a matter of law. The Raiders and their managing general partner Al Davis expressed, on various occasions prior to the vote of the NFL team owners withholding League authorization for the Raiders proposed relocation, their refusal to forego these relocation plans regardless of the wishes of the NFL. They in essence denied any contractual

obligation to submit their relocation plans to the League for approval, and deliberately sought to avoid or circumvent the prescribed procedure for obtaining a vote of the other teams. In fact, the Raiders even notified the League, prior to the owners' vote, that they had officially and unilaterally "moved" to Los Angeles, had begun shipping some of their team assets south, and were thereafter to be referred to as the "Los Angeles Raiders." It cannot reasonably be maintained that the NFL's subsequent withholding of authorization, but not these actions of the Raiders, constituted a breach of the implied promise of good faith and fair dealing.

In so ruling, we have had to address a question of first impression, as the district court's crucial jury instruction quoted above relies upon a novel legal principle. No California court—and, to our knowledge, no other state or federal court—has confronted the question of mutuality of good faith responsibilities in the form in which it has arisen in the present case: where both parties to a contract breach the implied promise of good faith and fair dealing with respect to the same affair, incident, or transaction, do the claims nullify each other so that neither party can recover for the breach, or can each bring suit to recover the damages which resulted from the other's breach? To look at it in a slightly different way, does a plaintiff's breach of the implied good faith promise constitute a defense to a suit against defendant for breach of the same implied promise, where both alleged breaches concerned the same episode in the parties' relationship, or is such a defendant's only recourse a separate counterclaim?

Because of the stark absence of case law on this issue, the reasonable policy arguments on both sides, and the possibly far-reaching ramifications of whatever rule of law is adopted on this issue in California, this would have been an appropriate question of state law to have certified for decision to the California Supreme Court. *See, e.g., Aetna Insurance Co. v. Craftwall of Idaho, Inc.*, 757 F.2d 1030, 1034 (9th Cir. 1985); *Meckert v. Transamerica Insurance Co.*, 742 F.2d 505, 506-07 (9th Cir. 1984). Unfortunately, the State of California, unlike the majority of states in this Circuit, has not yet seen fit to follow the

exhortation of the Supreme Court to legislatively create a certification process whereby its courts would be empowered to accept certain questions of state law from the federal courts. *See Lehman Bros. v. Schein,* 416 U.S. 386, 390-91 (1974). We have thus been compelled to resolve this question ourselves.

We have been motivated by several considerations to adopt a rule whereby mutual breaches of the implied good faith obligation extinguish one another. Such a rule will tend to reduce resort to formal litigation by parties engaged in contractual disputes and misunderstandings which might be characterized as breaches of the vaguely-defined duty of good faith and fair dealing by creative counsel. It will encourage, instead, settlement through constructive negotiation or alternative modes of dispute resolution, thereby not only fostering the ongoing cooperation which is a primary purpose of good faith obligations, but also conserving judicial and social resources. Our willingness to pursue such policy goals has been influenced by the private nature of breaches of contract; we might have hesitated to follow such a course if other important public interests were directly at stake in litigation concerning the covenant of good faith and fair dealing. *See First Beverages, Inc. of Las Vegas v. Royal Crown Cola Co.,* 612 F.2d 1164, 1175 (9th Cir.) (separate counterclaim, and not mere reduction or cancellation of defendant's liability, held to be appropriate so that both public wrongs might be vindicated), *cert. denied,* 447 U.S. 924 (1980). Finally, we see no justice in permitting a plaintiff to complain of unfair dealing in a transaction when he himself has not fulfilled his contractual obligations with regard to that transaction in good faith. *Cf. Pond v. Insurance Co. of North America,* 151 Cal. App. 3d 280, 289-90, 198 Cal. Rptr. 517, 522 (1984) ("unclean hands" doctrine; applies to suits at law as well as equity); Chafee, *Coming into Equity with Clean Hands,* 47 Mich. L. Rev. 1065, 1074-75, 1091-92, 1096 (1949).

We emphasize that our ruling does not embrace a broad rule whereby any two breaches of the implied good faith promise by opposing contracting parties constitute "offsetting penalties" which cancel each other out; our ruling applies only to factual contexts such as the present one, where both breaches concerned the same issue and occurred during one episode of the contractual

relationship. *Cf. Fibreboard Paper Products Corp. v. East Bay Union of Machinists,* 227 Cal. App. 2d 675, 728, 39 Cal. Rptr. 64, 97 (1964) (similar limitation in "unclean hands" context); *Republic Molding Corp. v. B.W. Photo Utilities,* 319 F.2d 347, 349 (9th Cir. 1963) (same). Had the Raiders displayed bad faith not when and in the manner in which they did, but rather during a different dispute with the NFL which was unrelated to the proposed relocation of the Raiders franchise, this would not have precluded their recovery for the breach by the NFL which is involved in the present case.

On remand, the district court should reverse its denial of judgment n.o.v. for the NFL on the contract claim, and vacate the corresponding portion of the damages judgment for the Raiders.

II. ANTITRUST STANDING

Section 4 of the Clayton Act, 15 U.S.C. § 15, broadly authorizes private damages actions under the antitrust laws: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." The class of persons entitled to obtain such damages has been limited by the Supreme Court, however, through the doctrine of "antitrust standing." *See Associated General Contractors v. California State Council of Carpenters,* 459 U.S. 519, 529-35 (1983).

The requirements of antitrust standing are greater than those of standing in its ordinary, constitutional sense. *Id.* at 535 n.31; *Bubar v. Ampco Foods, Inc.,* 752 F.2d 445, 448 (9th Cir.), *cert. denied,* ____ U.S. ____, 105 S. Ct. 3481 (1985). The Supreme Court, eschewing mechanical tests of antitrust standing frequently employed by courts, has specified certain factors which are to be evaluated on a case-by-case basis in order to determine whether a plaintiff who has suffered an injury which bears a causal connection to the alleged antitrust violation also satisfies the more demanding antitrust standing standard: (1) the motive of the defendant—whether it specifically intended to cause plaintiff's harm; (2) the nature of plaintiff's injury—whether it was of a type the antitrust laws were designed to prevent; (3) the directness of

the causal connection between the violation and the injury; (4) the extent to which abstract speculation underlies the allegations of injury and of their causation by defendant's antitrust violations; and (5) the risk of duplicate recoveries or complex apportionment of damages if plaintiffs such as this are permitted to recover. *Associated General Contractors,* 459 U.S. at 537-45; *Bubar,* 752 F.2d at 449.

Appellants seek to persuade us, by focusing upon two of these factors in particular, that the Raiders and the Coliseum lack antitrust standing to recover treble damages from the NFL under 15 U.S.C. § 15. In basing their argument upon only some of the factors, appellants implicitly assume that a favorable finding on each and every one of the above factors is a necessary precondition to a finding of antitrust standing. We reject any such implication. Most cases will find some factors tending in favor of standing (to a greater or lesser degree), and some against (also in varying degrees), and a court may find standing if the balance of factors so instructs. *See Ostrofe v. H.S. Crocker Co.,* 740 F.2d 739, 741 (9th Cir. 1984) (discussing *Associated General Contractors*), *cert. dismissed,* ____ U.S. ____, 105 S. Ct. 1155 (1985); *Merican, Inc. v. Caterpillar Tractor Co.,* 713 F.2d 958, 965 (3d Cir. 1983), *cert. denied,* 465 U.S. 1024 (1984). Thus, ordinarily, we will not narrowly address arguments offered against a plaintiff's standing by examining only those factors pointed to by defendants. In the present case, however, we find appellants' particular contentions to be without merit, and so do not analyze the remaining factors in detail.

A. The Nature of the Injury: *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*

The NFL contends that the injuries suffered by the Raiders and the Coliseum were not of a type the antitrust laws were intended to prevent, basing its argument upon *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977). There, the Court denied a treble damages cause of action to a group of bowling centers, for an alleged violation of section 7 of the Clayton Act. The bowling centers suffered economic harm when Brunswick acquired, and thereby facilitated the continued operation of, a number of their financially ailing competitors. After noting that

plaintiffs were in essence complaining not that Brunswick had reduced competition, but that it had actually preserved it, the Court stated that recovery could be had only for injury "that flows from that which makes defendants' acts unlawful" and that "reflect[s] the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Id.* at 489, *quoted in Blue Shield of Virginia v. McCready,* 457 U.S. 465, 482 (1982). We have stated that the *Brunswick* standard is satisfied "on a showing that the injury was caused by a reduction, rather than an increase, in competition flowing from the defendant's acts." *California Computer Products v. IBM,* 613 F.2d 727, 732 (9th Cir. 1979).

The NFL's basic contention is that appellees never proved that their injuries were caused by the restraint of competition which flowed from the antitrust violation in this case. This argument is a curious one, and is predicated upon an unduly narrow concept of "competition."

The NFL apparently conceives of competition as something to be uniformly avoided by all rational business enterprises. The League seems to argue that the only losses of appellees which are compensable under *Brunswick* are those which require for their description some reference to the Los Angeles Rams, the other football team in the city to which the Raiders sought to relocate. Any losses merely attributable to the prevention of the relocation—attributable, that is, to the inability of the Raiders to operate in the desired regional market, and to the Coliseum's inability to lease its facility to the Raiders for their football games—supposedly do not constitute "antitrust injury" because, the NFL argues, they do not flow from the prevention of competition between the Raiders and the Rams.

The NFL's effort to thus unduly restrict the range of antitrust impact is rejected. "Competition," in the business context, need not, and in fact usually does not, involve any measures which expressly acknowledge, let alone take aim at, other competitors. One competes in a market merely by operating an enterprise in it. Competition, therefore, is not always dreaded by business people; indeed, it is often avidly sought by those who do not yet operate in a potentially lucrative market.

Appellants are liable for antitrust damages because they restrained competition between NFL teams and among football stadia by restraining the Raiders attempt to move and *operate* in Los Angeles. Merely by operating there, the Raiders would have been competing with the Rams, and the Coliseum would have been able to bid effectively for a professional football team as its tenant. The restraint of this competition constitutes a sufficient basis for treble damages relief under *Brunswick*.

The NFL makes much of the fact that appellees' damages claims made no reference to the Rams or to the effect that the presence of the Rams would have upon appellees' income and expenses. But any evidence of lost profits implicitly accounted for the Rams, and the NFL should have introduced contrary evidence if it felt that the presence of the Rams rendered the Raiders' or Coliseum's figures inaccurate. Moreover, the less the Rams' presence influenced the amount of appellees lost profits, the greater the indication that the football and stadium markets could have tolerated more freedom of movement for NFL teams and have functioned in an economically inefficient manner due to the territorial restrictions.

Finally, the NFL complains that the district court's jury instructions on this issue were insufficient. We disagree. The court expressly instructed the jury that the Raiders and the Coliseum could not recover damages unless they met their burden of proving, by a preponderance of the evidence, "that the injury was the result of a restriction in competition." *Cf. Handgards, Inc. v. Ethicon*, 743 F.2d 1282, 1296 (9th Cir. 1984) (approved instruction that losses not recoverable if caused by increase in competition), *cert. denied*, ____ U.S. ____, 105 S. Ct. 963 (1985).

B. Directness of the Injury (Coliseum)

Appellants contend that the injury suffered by the Coliseum was too remotely and indirectly connected to the NFL's antitrust violation to be compensable under 15 U.S.C. § 15. We find this argument to be without merit.

We determined in *Raiders I* that the "claims of the Raiders and the L.A. Coliseum . . . present somewhat different market considerations." 726 F.2d at 1393. Upholding the jury's liability verdict

in favor of both parties, we found sufficient evidentiary support for the jury's finding that the NFL's territorial restraints in this case not only impaired competition between NFL football team franchises, but also restrained competition in the "stadia market" between rival stadia (such as the Oakland Coliseum and the L.A. Coliseum) that seek to secure NFL tenants. *Id.* at 1393-94.

Clearly, the Coliseum suffered direct harm as the result of the NFL's antitrust restraints in that latter market. Unlike the alleged injury found to be too indirect by the Court in *Associated General Contractors*, the Coliseum's injury was not filtered through "several somewhat vaguely defined links." 459 U.S. at 540. The Coliseum was a competitor in a market in which competition was directly and quite foreseeably, if not also intentionally, restrained. This stadium, which had previously sought to acquire the Minnesota Vikings team as a tenant, was engaged in a bidding struggle with its Oakland counterpart for the tenancy of the Raiders, and was injured when the NFL's application of its territorial restrictions foreclosed further undistorted negotiations.

We are confident that our ruling will not be misinterpreted as being a broad endorsement of antitrust standing for all parties who might have contracted with the Raiders had they not been restrained in their relocation plans. Football stadia constitute a special market distinguished from those comprised by, say, hotels, laundering establishments, or limousine services, by their indispensable and intimate connection with professional football and football teams. An injury such as that suffered by the Coliseum in the present case cannot fairly be characterized as an indirect "ripple effect."

The district court was correct in denying appellants' motion to dismiss the Coliseum's damages claim for lack of standing.

III. DAMAGES: SUFFICIENCY OF THE EVIDENCE

As indicated above, we undertake only limited review of jury damages awards, in order to avoid encroaching upon the jury's proper function under the Constitution. The NFL launches various assaults upon the sufficiency of the evidence, but we find nothing in these to justify any interference with the damages verdicts. After examining the record in light of the NFL's

contentions on appeal, we conclude that the jury's awards are supported by substantial evidence, and are neither grossly excessive nor based upon mere speculation.

While we do not respond explicitly to each of the NFL's many allegations of error, we do note the NFL's arguments that the Raiders and the Coliseum failed to prove the requisite causal links between the NFL's antitrust violation and certain elements of the alleged damages. Recovery will not be permitted for injuries which have been independently caused by something other than the antitrust violation. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 126-28 (1969). However, a plaintiff need not prove that the antitrust violation was the only cause of its injury in order to recover damages under 15 U.S.C. § 15; proof that the violation was a material cause is sufficient. *Id.* at 114 n.9; *William Inglis & Sons*, 668 F.2d at 1051.

In the present case, the jury's implicit findings of causation of damages were generally supported by substantial evidence. The only possible instances where appellees' submitted damages estimates may have been unfounded because of a lack of proof of causation were their claims for lost profits that would have been earned had luxury stadium boxes been built in the Coliseum and rented for the Raiders' 1980 football season, and perhaps also part of the Raiders' claim for the "reduced value" of a loan whose receipt was delayed as a result of the NFL's violation.

Even if we eliminate these questionable elements of appellees' claims, however, the jury had before it sufficient evidence, including the attendance and seat price estimates offered by the Raiders, on which to reach the damages amounts it awarded to both parties. Even a total inadequacy of proof on isolated elements of damages claims submitted to a jury will not undermine a resulting aggregated verdict which is nevertheless reasonable in light of the totality of the evidence. If we find that a jury's damages award exceeds the maximum amount sustainable by the probative evidence, we will not hesitate to order a remission of the excess by the plaintiff or, in the alternative, a new trial. *See D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245, 1249 (9th Cir. 1982); *Fenner v. Dependable Trucking Co.*, 716 F.2d 598, 602-03 (9th Cir. 1983). But where, as here, the jury's verdicts

find substantial support in the record and lie within the range sustainable by the proof, we will not "play Monday morning quarterback" and supplant the jury's evaluation of the complex and conflicting evidence with our own. *Segal v. Gilbert Color Systems, Inc.*, 746 F.2d 78, 80-81 (1st Cir. 1984); *see, e.g., W.A. Wright, Inc. v. KDI Sylvan Pools, Inc.*, 746 F.2d 215, 219 (3d Cir. 1984).

IV. DAMAGE OFFSETTING RULE (RAIDERS) WRITTEN BY JUDGE WILLIAMS WITH JUDGE NELSON DISSENTING

In accordance with the analysis contained in Parts II and III of this opinion, the jury could properly have found that the amount of the Raiders' lost profits from the delay of two years in moving to Los Angeles amounted to $11,554,382. However, we conclude that the district court erred in limiting the NFL's damage offset defense, when it excluded from the jury's consideration in calculating damages the benefits the Raiders realized by taking from the NFL the opportunity to establish an expansion franchise in Los Angeles.

Two related offset theories are potentially applicable to this case. The fault-based offset theory, premised on *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140 (1968), provides that the "beneficial byproducts" of an illegal restraint to which the plaintiff is a party should be offset against the damages incurred by plaintiff which resulted from the restraint. The second theory, which does not depend upon a plaintiff's culpability, is based on general principles of damages which limit a plaintiff's recovery under the antitrust laws to compensation for the "net" injury incurred as a result of the defendant's antitrust violation. Under this theory, in order to put a plaintiff in the position it would have been, absent the defendant's antitrust violation, the plaintiff's gross recovery for the antitrust violation must be reduced by any benefits that plaintiff would not have received had there been no anticompetitive conduct by the defendant, or, more generally, by amounts which are unnecessary to fully compensate a plaintiff for the adjudicated violation. The relevant inquiry is "what plaintiff's situation would have been in

the absence of the defendant's violation." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. at 566.

Although distinct, the two offset theories are based on the same underlying objective: avoiding overcompensation of plaintiffs through awarding damages beyond the actual extent of their injuries. The theories differ in that, under *Perma-Life*, the benefits to be offset accrued to the plaintiff *because of* its status as a party to the defendant's illegality, whereas under the second theory, the plaintiff's role is essentially irrelevant. The court's task under the latter theory is to award damages to put the plaintiff into the position it would have been, absent the antitrust violation. This requires a deduction for benefits that would not have accrued to plaintiff in the absence of the violation, or for claimed damages which exceed the scope of the defendant's liability. The parties' briefs do not clearly distinguish between these two types of offsets, apparently treating them as one. However, because the two theories differ in their application, we examine them separately in order to apply them correctly to this case.

The *Perma-Life* offset arises where the plaintiff was a party to the defendant's antitrust violation. In such situations, the "beneficial byproducts of a restriction [of competition] from a plaintiff's point of view" are to be offset against the plaintiff's damages resulting from the restraint. *Perma-Life*, 392 U.S. at 140. In *Perma-Life*, the Court held that a plaintiff's participation in the defendant's antitrust violation could not constitute a total bar to liability for the violation, under the equitable doctrine of *in pari delicto*. Rather, the court stated, the benefits realized by the plaintiff from the restraint should be deducted from plaintiff's gross antitrust damages in order to arrive at the amount representing the extent of plaintiff's actual (net) injury from the illegal restraint. *Id. See, e.g., Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 695 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976), II P. Areeda & D. Turner, *Antitrust Law* at 255 (1978).

The second, non-fault based offset theory is simply a corollary of the general principle, applicable outside the antitrust context, that an award of damages should put a plaintiff forward into the position it would have been "but for" the defendant's violation of the law. A plaintiff's antitrust damages are to be calculated "by

comparison of profits, prices and values as affected by the conspiracy, with what they would have been in its absence under freely competitive conditions." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). *Accord, J. Truett Payne,* 45 U.S. at 566. The inquiry involves a comparison of "the plaintiff's actual situation with the hypothetical situation that would have existed in the absence of the violation." II Areeda & Turner, *supra* at 229. Under this theory, the ultimate relief awarded must take into account any benefits which would not have been received by plaintiff "but for" the defendant's anticompetitive conduct, or amounts a plaintiff would have expended in the absence of the violation. An antitrust plaintiff may recover only to the "net" extent of its injury; if benefits accrued to it because of an antitrust violation, those benefits must be deducted from the gross damages caused by the illegal conduct.

This principle is aptly illustrated by the case of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), which affirmed a district court's reduction of damages by the amount the plaintiff would have been required to expend in the absence of defendant's illegal restraint of trade. In *Hanover Shoe,* the defendant's practice of leasing and refusing to sell its more complicated and important shoe machinery was found to be an illegal act of monopolization. Because the plaintiff would have bought rather than leased the machinery from the defendant had it been given the opportunity to do so, the Court offset against the plaintiff's gross antitrust damages (the rental price paid for leasing the machines) the amount plaintiff would have paid to purchase the machines absent the "lease-only" restraint of trade. *Id.* at 487. This same offset principle was also applied later in the opinion, when the Court affirmed the district court's deduction from antitrust damages of the cost of capital that the plaintiff would have incurred had it been able to purchase defendant's machines. Because of defendant's illegal insistence on leasing rather than selling its product, plaintiff was able to avoid the capital cost it would have incurred in buying the machines (the interest rate at which it would have been able to obtain the capital to purchase the machines). *Id.* at 503-04. Placing plaintiff in the position it would have been, absent the antitrust violation, thus required deducting from gross damages the amounts plaintiff would have

expended if defendant had been willing to sell the machinery to plaintiff.

This netting rule reflects the more general requirement that an antitrust plaintiff recover only for "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 489 (emphasis in original). Under *Brunswick*, the essential inquiry is whether the damages sought by the plaintiff are for injuries which flow from the defendant's anticompetitive conduct. Relief which is beyond the scope of an adjudicated antitrust violation may not be awarded. As shall be discussed in more detail below, just as it is necessary to deduct from a gross damage recovery the benefits a plaintiff would not have received absent an antitrust violation, the *Brunswick* rule requires that the gross relief awarded for an antitrust violation be offset by amounts which are not attributable to the defendant's illegal conduct. A "plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne*, 451 U.S. at 562.

Determining how these offset mechanisms apply to the facts of this case depends in part upon which of two alternative interpretations of the liability verdict, relating to the precise nature of the NFL's antitrust violation, are correct. The first alternative, proposed by the NFL, construes the liability jury's general verdict in favor of the Raiders as a finding that Rule 4.3 *by itself* was an illegal restraint of trade. The second alternative, urged by the Raiders, construes the verdict to have found Rule 4.3 invalid only as it was applied to prevent the Raiders from moving from Oakland to Los Angeles. Both the NFL and the Raiders appear to assume that a decision between these alternatives will necessarily determine the larger question of whether the district court erred in limiting the NFL's offset defense. However, as the discussion below demonstrates, the NFL's offset evidence was improperly restricted by the district court under *either* interpretation of the verdict. Each alternative will be considered in turn.[1]

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[1] Because the two views of the verdict ultimately lead to a divergence with respect to the amount of the Raiders' benefits that should be offset

A. Alternative I: Rule 4.3 Illegal by Itself

Assuming first that Rule 4.3 by itself was found by the liability jury to have been illegal, then the Raiders, by virtue of their participation in the continued existence of Rule 4.3 during their years in the NFL, were parties to that restraint along with the other NFL clubs, at least until the Raiders challenged the rule in 1980. If the Raiders were parties to the restraint, a straightforward application of the *Perma-Life* rule would require all benefits accruing to the team from Rule 4.3's territorial restrictions to be offset against their damages. The NFL's offer of proof with regard to the offset defense noted three types of benefits that the Raiders received from Rule 4.3 over the years: (1) increased television revenues because of the stable geographic dispersal of franchises, (2) benefits from the Oakland community due to the seeming stability fostered by Rule 4.3, and (3) the preservation of the Los Angeles expansion opportunity which the Raiders eventually moved into.

We can see no principled argument that could preclude application of the *Perma-Life* rule to the facts of this case, given the assumption that the liability verdict found Rule 4.3 to be illegal over the years the Raiders belonged to the NFL. If Rule 4.3 was illegal and the Raiders were a party to that illegality, then the benefits flowing to the Raiders from that restriction on competition would have to be offset against the Raiders' damages to the full extent proposed by the NFL. Accordingly, were we to adopt the NFL's construction of the jury's liability verdict, the *Perma-Life* theory would require that we vacate the district court's damage award and remand for consideration of the amount of the benefits received by the Raiders that should be offset against their lost profits.[2]

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against their damages, it is necessary to decide which interpretation of the liability verdict is correct. *See infra* at 26. However, we discuss both alternatives in order to more clearly illustrate the parameters of the two offset theories at issue in this case.

[2] Because the *Perma-Life* theory would require such an offset, it would be unnecessary to inquire into the effect of the *Hanover Shoe* type of offset under this interpretation of the verdict.

B. Alternative II: Rule 4.3 Illegal Only as Applied to Raiders' Move

Although the above-described interpretation of the verdict is plausible, it is ultimately inconsistent with the actual history of this case. The Raiders' construction of the verdict—that Rule 4.3 was found to be invalid only as it was applied to the Raiders' proposed move to Los Angeles—finds much greater support in the record than does the NFL's version. The liability jury was instructed that "the overriding issue you are asked to decide is whether Rule 4.3 as applied to this case is an unreasonable restraint of trade under Section 1 of the Sherman Act." 32 Tr.2d 7211.[3] Moreover, while the evidence heard by the liability jury could support either construction of the verdict, it is consistent with the principles of res judicata to interpret the verdict to have decided only what was necessary to have reached its general verdict for the Raiders. In concluding as it did, the jury need not have reached the broad issue of the legality of Rule 4.3 by itself; they need only have found it invalid as it was applied to the Raiders' move. Such an interpretation of the verdict is consistent with that of the trial judge, who indicated his agreement in so limiting the final equitable decree permitting the Raiders to move to Los Angeles.[4] Moreover, we affirmed the liability judgment in *Raiders I* only after examining the particular anticompetitive conduct and markets involved in the circumstances of the Raiders' contemplated move. *See Raiders I* at 1395-98. Accordingly, we find that the Raiders' interpretation of the liability verdict is correct, and thus construe the verdict to have held Rule 4.3 invalid only as it was applied to the Raiders' proposed move to Los Angeles. We therefore analyze this second alternative in greater detail, below.

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[3] "T.R. 2d" refers to the reporter's transcript of the second liability trial and damages trial. "C.R." identifies documents contained in the district court record, listed by the docket numbers assigned by the Clerk of that court.

[4] Final Decree, C.R. 2090 (June 14, 1982). The trial judge rejected the broad decree sought by the Raiders, which would have prohibited the NFL from enforcing Rule 4.3 in any form or context. *See* C.R. 2073.

If, as we have decided, Rule 4.3 was not illegal until it was applied to the Raiders' move, then the Raiders were not a party to an illegal restraint over the years, and the benefits accruing to them by reason of that restraint were not the beneficial byproducts of an antitrust violation. Therefore, the fault-based *Perma-Life* theory simply could not be applied to offset the benefits received by the Raiders over the years from Rule 4.3. However, application of the *Hanover Shoe* offset mechanism in light of this construction of the liability verdict provides a quite different outcome.

As indicated above, the *Hanover Shoe* offset rests on the principle that, to put the plaintiff into the position it would have been, absent the defendant's antitrust violation, benefits that would not have been received by the plaintiff had there been no violation, or amounts which represent a recovery beyond the scope of the adjudicated antitrust liability, must be offset against the gross relief awarded. This offset principle has been applied in a variety of antitrust cases, both in this Circuit and elsewhere.

In the seminal case of *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), the defendant franchisor was found to have illegally tied the sale (to its franchisees) of equipment and supplies, to the licensing of defendant's "Chicken Delight" trademark. The defendant did not charge its franchisees (the plaintiffs) directly for the use of the trademark, but instead required the purchase of the equipment and supplies as a condition of the use of the trademark. The district court awarded as damages for this illegal tying arrangement the full amount plaintiffs were overcharged for the tied items (the equipment and supplies). This court reversed the damage award, holding that the gross damage amount should have been offset by the "reasonable value [of] the Chicken Delight license." *Id.* at 52. In other words, in order to put the plaintiffs into the position they would have been, absent the illegal tie, the overcharges on the tied items should have been reduced by the amount plaintiffs would have paid for the license in the absence of the unlawful restraint. This court's decision was simply a recognition of the fact that if the defendant had not required the purchase of the equipment and supplies, it would have (legally)

charged plaintiffs for the right to use the trademark. Plaintiffs were not entitled to both their damages from the overcharges on the tied products *and* access to the tying products free of charge. Rather, we directed that the plaintiffs' damage award be reduced by the amount plaintiffs would have paid for the use of the trademark, in the absence of the antitrust violation. As we stated, "the cost or value of the products involved, free from the unlawful arrangement, must first be ascertained." *Id. See also Burlington Industries, Inc. v. Milliken & Co.*, 690 F.2d 380, 385-86 (4th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983) (offsetting against plaintiff's gross damages "the amount which plaintiffs would have paid . . . in the absence of the royalty-maintenance conspiracy").

This offset mechanism may also be utilized to reduce a damage award where a portion of that award includes damages which go beyond the scope of adjudicated antitrust liability. Consistent with *Brunswick*, any damages awarded must be attributable to conduct which violated the antitrust laws. Where a plaintiff's recovery flows from conduct which has been found to be legal in part and illegal in other respects, *Brunswick* requires that the award be reduced to reflect a recovery only for that conduct found to be illegal under the antitrust laws. Thus, in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), the district court's damage award included a recovery not only for the defendant's anticompetitive actions, but also for certain of its practices that were legal. The Second Circuit reversed, holding that the damage recovery should have compensated the plaintiff only for that portion of the defendant's conduct which was found to be illegal. The court emphasized that the Sherman Act does not require a party "whose position has for the most part been attained legitimately . . . to forfeit all fruits of its success because its power has merely been supplemented by improper conduct." *Id.* at 298. Similarly, in *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983), the plaintiff premised its damage study on conduct of the defendant that was later found to be partially lawful and partially anticompetitive, and provided no means for the jury to separate out damages resulting from the illegal conduct. The Seventh Circuit vacated the resulting damage award, requiring that the award be limited

to "the *illegal* practices of the defendant." *Id.* at 1161 (emphasis in original) "To allow otherwise would force a defendant to pay treble damages for conduct that was determined to be entirely lawful." *Id.* at 1162-63. *Accord, ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F.Supp. 423, 434 (N.D.Cal. 1978), *aff'd sub. nom. Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980) (per curiam), *cert. denied*, 452 U.S. 972 (1981), *Allegheny Pepsi-Cola v. Mid-Atlantic Coca Cola*, 690 F.2d 411, 415 (4th Cir. 1982), *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975).

In light of these authorities, it becomes our task to compare the relative positions of the parties, before and after the application of Rule 4.3, in order to reconstruct what the Raiders' position would have been in the absence of the NFL's antitrust violation. We thus must determine whether any benefits were received by the Raiders that would not have belonged to them had Rule 4.3 not been improperly applied to their contemplated move to Los Angeles, or whether the relief awarded extends beyond the scope of the antitrust liability found by the jury.

Prior to 1980, the NFL as a whole owned the right to expand into the Los Angeles area. As evidence at both phases of the trial in this case demonstrated, the Los Angeles opportunity represented an extremely valuable expansion possibility for the league. *See* Stanford Research Institute Study (Plaintiff's Exhibit 48). The value of the Los Angeles opportunity arose not only from the economic potential of one of the nation's largest media markets, but also from the NFL's well-established and widely followed nationwide entertainment product. That product had developed over the years into a geographically diverse structure of teams, with traditions, rivalries, well-known players and national media interest, all of which greatly enhanced the value of any expansion opportunity. If and when the NFL placed an expansion team in the Los Angeles area,[5] the accumulated value of the Los Angeles opportunity would have been realized by the NFL through charging the new expansion team owner for the expansion opportunity. *See, e.g.*, 16 Tr.2d 3148-49.

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[5] The Rams, by this time, were playing in Anaheim.

As indicated above, the value of the league's expansion opportunities belonged to the league as a whole, or in other words, was owned in part by each franchise owner. Unquestionably, when the Raiders moved to Los Angeles, they appropriated for themselves the expansion value that had accumulated in Los Angeles. Although by moving out of Oakland the Raiders "gave back" an expansion opportunity to the NFL, the uncontradicted testimony at trial showed the Los Angeles market to be a significantly more lucrative franchise opportunity. Indeed, the Raiders' managing general partner, Al Davis, testified that the Raiders increased their value by some $25 million by moving to Los Angeles. 26 Tr.2d 5562, 59 Tr.2d 11578. *See also* 16 Tr.2d 3115.

If, as the Raiders contend and we have found, the jury decided that Rule 4.3 was illegal only as it was applied in 1980, then the NFL's development of the Los Angeles expansion opportunity until 1980 cannot be said to be illegal in the eyes of the antitrust laws. Thus, at least as far as the law of this case is concerned, the NFL legitmately possessed the value of that expansion opportunity that had accrued until 1980. (Note that if the jury *had* found the NFL's development of the Los Angeles opportunity through 1980 to be illegal, the Raiders, as a party to that illegality, would then have been fully subject to the *Perma-Life* offset. *Supra* at 25.) By finding that the NFL viloated the antitrust laws through its application of Rule 4.3 in 1980, the liability verdict gave the Raiders only the right to play football in Los Angeles from 1980 forward. Because the verdict did not find Rule 4.3 illegal over the years, it did not mandate an award to the Raiders of the value of the Los Angeles opportunity that had accumulated prior to 1980. The verdict did entitle the Raiders to the right to play in Los Angeles on into the indefinite future and to damages for lost profits from the two years the Raiders remained in Oakland after the NFL improperly refused to permit their move. However, because the NFL's cultivation of the Los Angeles opportunity until 1980 was not found to violate the antitrust laws, an award of that opportunity to the Raiders would constitute a recovery for conduct of the NFL which was not found to be illegal. Under *Brunswick*, the accumulated value of that business opportunity is not something to which the Raiders became entitled as a result of the liability verdict. As a result, the injunction permitting the

Raiders to play NFL football in Los Angeles provided them with a windfall benefit beyond the scope of the antitrust verdict.

Although this overbroad injunctive relief may have been appropriate because such an equitable remedy was at the core of this litigation, the principles of *Brunswick* and *Berkey Photo* require that this windfall be taken into account when awarding *additional* damages beyond the injunctive relief. Specifically, the Raiders' additional damage award (for lost profits from the two years the NFL prohibited their move to Los Angeles) should be offset to the extent their injunctive relief exceeded the scope of the antitrust verdict. As the situation stands pending this appeal, the Raiders have been awarded both the portion of the Los Angeles opportunity that had been legitimately possessed by the NFL, and additional monetary damages. To limit the Raiders' recovery to their injury flowing from the NFL's adjudicated violation, it is necessary to offset the Raiders' damage award against the excess portion of the injunctive relief, until that excess is fully exhausted. Then, and only then, may additional monetary damages be awarded consistent with *Brunswick* and its progeny. To do otherwise would in effect permit the Raiders to recover for conduct of the NFL that did not violate the antitrust laws. To paraphrase *Berkey Photo*, "instead of being required simply to compensate [the plaintiff] for the consequences of its wrongful action, [the NFL] would be required to forfeit its legitimately acquired advantage." 603 F.2d at 298.

Rather than remand for an entirely new trial on the question of damages, as was necessary in *Berkey Photo* and *MCI*, it is possible in this case to utilize the jury's calculations of gross damages as a component of the damage-netting mechanism exemplified in *Hanover Shoe* and *Siegel*. Because the Raiders' gross damages from their two year delay in moving to Los Angeles have been, as we have found, properly determined, the remaining task for the district court on remand will be to calculate the value of the Raiders' injunctive relief that exceeded the scope of the liability verdict, and offset that value against the Raiders' monetary award. As indicated above, the excess portion of the injunctive relief can be measured as the value of the NFL's Los Angeles expansion

opportunity in 1980, prior to the NFL's illegal conduct, less the value of the Oakland opportunity returned to the league.

Another way of looking at the application of this offset to the facts is through a comparison of the Raiders' actual situation "with the hypothetical situation that would have existed" had there been no antitrust violation. II Areeda & Turner, *supra*, at 229. As indicated above, it was the NFL's customary practice to charge owners of new franchises for the expansion opportunity received. The price charged new franchisees reflected the value of the expansion opportunities being provided. For instance, the price charged for an expansion team doubled in the years from 1966 to 1976, from $8.5 million to $16-17 million.[6] If the NFL had voted in favor of the Raiders' move to Los Angeles in 1980, it would have been justified in imposing an analogous charge on the Raiders to account for the excess value of the Los Angeles opportunity the Raiders were receiving over the "Oakland opportunity" that was being returned to the league. In other words, the amount of compensation sought by the NFL might reasonably have reflected the difference between what it could have obtained from a new franchisee in Los Angeles, and a new franchisee in Oakland. In the absence of the NFL's antitrust violation, the Raiders would have been playing football in Los Angeles, but would have been required to compensate the NFL for the excess value of the Los Angeles opportunity.

Application of this offset rule is consistent with, and indeed, virtually compelled by, this court's *Raiders I* opinion. In analyzing the "unique" nature of professional athletic leagues vis-a-vis the antitrust laws, this panel expressly acknowledged that "the nature of NFL football requires some territorial restrictions in order both to encourage participation in the venture *and to secure each venturer the legitimate fruits of that participation.*" *Raiders I* at 1396 (emphasis added). Here, the league owners collectively possessed the value that had accumulated in the Los Angeles

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[6] 16 Tr.2d 3010; *Antitrust Policy and Professional Sports: Hearings on H.R. 823, H.R. 3287, and H.R. 6467 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 1st & 2d sess. 276 (1981-82)

expansion opportunity. This value, as indicated above, was created at least in part through the NFL's development, over the years, of a popular spectator sport with a national following. Although this panel upheld the liability jury's conclusion that Rule 4.3 as it was applied to the Raiders' move was an unreasonable restraint of trade, the opinion noted several less onerous forms of territorial restrictions that could pass muster under the rule of reason. Among these were standards restricting team movement that expressly recognized certain objective factors such as population, economic projections and the like, that the league could legitimately consider in deciding whether to permit a team to move. *Id.* at 1397. If such restrictions, applied in a non-arbitrary manner, would be reasonable under the Sherman Act, then *a fortiori*, a rule requiring merely an objectively-determined payment to league members as compensation for the right to take a valuable, jointly owned franchise opportunity out of the league's hands, would also be a reasonable restriction.

Thus, by taking possession of the Los Angeles expansion opportunity from the NFL, the Raiders reaped a windfall benefit beyond the scope of the antitrust verdict. For this reason, and also because the NFL, in the absence of its antitrust violation, would have been justified in requiring the Raiders to compensate the NFL for the excess value represented by the Los Angeles expansion opportunity,[7] that excess value should have been offset against the Raiders' lost profits from the two years they were precluded from moving to Los Angeles. The district court therefore erred in refusing to admit evidence of the full benefits of the Los Angeles expansion opportunity received by the Raiders, and in refusing to instruct the jury on the NFL's offset defense. The court incorrectly limited the NFL's offset evidence in this regard to the "negotiating advantage" the Raiders received during the

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[7] In footnote 1 of her dissenting opinion, Judge Nelson suggests that our offset analysis is dependent upon an assumption that the NFL would have charged the Raiders for the excess value represented by the Los Angeles opportunity. However, this assumption is raised only as an alternative to our primary holding, that the relief awarded the Raiders is beyond the scope of the adjudicated antitrust liability, and for that reason should be offset.

1980-82 period by virtue of the fact that Rule 4.3 discouraged other teams from moving to Los Angeles during that period. On remand, the scope of the offset should be broadened to include the full value of the Los Angeles opportunity that had accrued prior to 1980, less the value of the "Oakland opportunity" that was returned to the NFL.

The district court was correct, however, in refusing to admit evidence of the other benefits the NFL sought to offset against the Raiders' damages. The increased television revenues attributable to Rule 4.3, as well as the benefits received from the Oakland community over the years as a result of Rule 4.3, are benefits that would have accrued to the Raiders even if Rule 4.3 had not been illegally applied to prevent the Raiders' move to Los Angeles. For the same reason, these benefits do not represent a windfall recovery beyond the scope of the antitrust verdict. Placing the Raiders in the position they would have been, absent the NFL's improper application of Rule 4.3, does not require deduction of these benefits from the Raiders' gross damages.

Although the Raiders protest that any offset of their damages is inconsistent with the policy of the antitrust laws to encourage private lawsuits, it is beyond dispute that the Sherman Act was not intended to provide recoveries, before trebling, in excess of the injuries that were actually caused by an antitrust violation. *Brunswick*, 429 U.S. 477. Moreover, even assuming that their award of monetary damages will be wholly offset, there is nothing necessarily wrong with "a damage assessment producing no net recovery," where that is a "result commanded by the necessity of offsetting injuries which plaintiffs may have suffered at the hands of defendants with benefits which they may have derived from the very activities they attack." Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127, 1136 (1976). *See also* II Areeda & Turner, *supra* at 257 (prospect of injunctive relief is the appropriate incentive for plaintiff to bring suit when antitrust "damages cannot be awarded [because] they don't exist"). As indicated above, by moving to Los Angeles the Raiders received not only what the liability verdict entitled them to—the right to play football in Los Angeles from 1980 forward—but also the windfall benefit of the Los Angeles expansion

opportunity that had legitimately belonged to the NFL as a whole prior to 1980. In order to accurately calculate the Raiders' net injury from the antitrust violation, their lost profits from 1980-82 must be reduced by the value of the injunctive relief awarded by the district court which exceeded the scope of the liability verdict. No case cited by the Raiders stands for the proposition that encouragement of antitrust suits requires a damage recovery (before trebling) to go beyond the extent of the plaintiffs' actual injury.

Similarly, we are not persuaded that antitrust policy requires that the offset amount be deducted from an already trebled gross damage award. Rather, as in *Siegel* and *Hanover Shoe,* the reduction should occur prior to trebling. An antitrust plaintiff is entitled to a trebled recovery, but only treble the amounts which are necessary to compensate it for the injury caused by the defendant's violation. The plaintiff's damages consist of either its lost profits caused by the antitrust violation or the value of the business that it is deprived of by the defendant's illegal conduct. One injured by an antitrust violation may not recover both measures of relief, because the value of the business "necessarily take[s] into consideration its future profit-earning potential." *Albrecht v. Herald Co.,* 452 F.2d 124, 129 (8th Cir. 1971). To award both future profits and the value of the business at the time of the violation would constitute a double recovery. *Id.* at 131, II Areeda & Turner, *supra* at 234.

As we have construed it, the liability verdict in this case entitled the Raiders only to the stream of profits that could be earned in Los Angeles beginning in 1980; it did not entitle them to the *value* of the Los Angeles expansion opportunity (the "value of the business") that had been legitimately possessed by the NFL. The monetary damage award gave them their profits from 1980-82, and the injunction covered their profits from 1982 forward. However, the injunction also gave them the "value of the business"—the excess value of the Los Angeles opportunity for which the NFL could have legitimately charged them. Thus, the combination of the injunction and monetary damages provided the Raiders with *both* the "lost profits" and the "value of the business" measures of relief.

Pending this appeal, then, the Raiders have been awarded double the compensatory relief to which they are entitled. In order to treble only a single measure of compensatory relief, this double recovery must be corrected before trebling; to do otherwise would in effect treble an incorrect measure of relief. Given the injunction that has already been awarded, the proper measure of compensatory relief in this case consists of the value of that injunction, plus whatever monetary damages are necessary to compensate the Raiders for the antitrust injury which is not redressed by the injunctive relief. To reach this monetary figure, the compensatory relief already received (i.e., the injunction, which includes the amount to be offset) must be deducted, *before* trebling, from the total compensatory recovery to which the Raiders are entitled. The resulting monetary amount combined with the injunction will fully compensate the Raiders for their injury, representing a *single* correct measure of compensatory relief. It is the monetary component of this overall recovery which should then be trebled.[8]

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[8] Judge Nelson asserts that out calculation of damages improperly omits the "residual" value of the difference in worth between the Los Angeles and Oakland opportunities (the "b" value from *Hanover Shoe*). To the extent that our decision is based on the hypothetical "outlay" of the Raiders to obtain the benefits of moving to Los Angeles (*see* footnote 7), there is simply no "residual" value present in this case which is analogous to the "b" value in *Hanover Shoe.*

In *Hanover Shoe,* it was appropriate to reduce "a", the expenditures the plaintiff was able to avoid because of defendant's insistence on leasing the shoe machinery, by the portion of "a" which remained in plaintiff's hands at the conclusion of the damage period (*i.e.,* "b", the residual value of the machines). This was because "a" by itself did not accurately reflect the plaintiff's actual outlay to purchase equipment; plaintiff's *net* outlay was the initial purchase price less the value of the machinery remaining in plaintiff's hands at the conclusion of the damage period. We can see no similar residual value remaining in the Raiders' hands as of 1982. The "residual value" identified by Judge Nelson, the difference between the 1982 values of the Los Angeles and Oakland opportunities, does not represent any value retained by the Raiders from their hypothetical outlay to acquire the Los Angeles opportunity. There is thus no reason to subtract that value from "a" to arrive at the Raiders'

In sum, either of two scenarios are possible. If Rule 4.3 was illegal by itself, over the years, then the Raiders, as a party to that restraint, would have their damage award offset under a direct application of the *Perma-Life* rule. If Rule 4.3 was not illegal over the years, then the Raiders were not party to an illegal restraint through 1980; however, in that case, neither would the NFL's conduct through 1980 have been illegal. Because we have determined that Rule 4.3 was found to be invalid only as it was applied to the Raiders' proposed move in 1980, the NFL's pre-1980 conduct is not something for which a recovery may be had under the antitrust laws. Under these circumstances, a portion of the Raiders' injunctive relief included the value of the NFL's Los Angeles opportunity that had legitimately accrued to the NFL through 1980, a recovery which did not "flow . . . from that which [made] defendants' acts unlawful." *Brunswick* at 489. The Raiders' additional monetary damages must be offset to the extent the injunctive relief went beyond the scope of the adjudicated antitrust violation.

CONCLUSION

We reverse the district court's denial of the NFL's motion for judgment n.o.v. on the Raiders' good faith and fair dealing claim, and remand so that the damages award on that claim can be vacated. As for the Raiders' and Coliseum's antitrust awards, we affirm the trebled damage verdict in favor of the Coliseum, but

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net outlay. To the extent that the 1982 value of the Los Angeles opportunity is relevant at all, it pertains to the question of the increase in value of that opportunity from 1980-82. That issue is dealt with in the following paragraph.

Judge Nelson also suggests that our analysis fails to take into account the extent to which the value of the Los Angeles opportunity increased from 1980 to 1982, relative to the value of the Oakland opportunity. On the contrary, this value is encompassed in the injunction awarded by the district court, which provided the Raiders with the *full* value of the Los Angeles opportunity as of 1982. Note that the increase in value of that opportunity from 1980 to 1982 is awarded by way of the jury's calculations of lost profits for those years.

vacate the Raiders' antitrust damage recovery, and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART and REMANDED.

NELSON, CIRCUIT JUDGE, DISSENTING FROM PART IV:

I respectfully dissent from Part IV of this opinion.

I believe that the majority misconstrues *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), when it offsets, before trebling, the 1980 value of the Los Angeles opportunity less the 1980 value of the Oakland opportunity.[1] In so doing, it improperly collapses the two separate and distinct tasks of this court: (1) assessing the damages suffered by the Raiders as a result of the NFL's antitrust violation; and (2) compensating the NFL for the benefit conferred upon the Raiders by the district court's injunction. In Section IA of this dissent, I show precisely where the majority errs, and how we should properly assess antitrust damages. In Section IB, I emphasize my agreement with the majority's conclusion that *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), does not apply to this case. In Section II, I set forth what I believe is the correct method for compensating the NFL.

I. The Raiders' Antitrust Damages

A. The Majority Misapplies *Hanover Shoe* by Omitting a Crucial Element of the Damages Formula Upheld by the Supreme Court

In purporting to apply *Hanover Shoe* to the calculation of the Raiders' damages, the majority concludes that it is necessary and

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[1] The majority's assessment of damages rests upon an assumption, neither pleaded nor proved by the NFL, that the League actually would have charged the Raiders the difference between the 1980 values of the Los Angeles and Oakland opportunities. I base much of my dissent on the same assumption, but note that I would require the NFL to plead and prove that fact on remand.

In this connection, I am puzzled by the majority's contention that its so-called "primary" holding does not assume that the NFL would have charged the Raiders for the move. *See ante* at n.7. If the NFL would not have charged the Raiders for the move, I see no way that the relief awarded could have been considered beyond the scope of the adjudicated antitrust liability.

sufficient to treble the difference between the Raiders' lost profits between 1980 and 1982 on the one hand, and the 1980 value of the Los Angeles opportunity minus the 1980 value of the Oakland opportunity on the other. I disagree. It is my view that damages resulting from the unlawful restraint include all lost financial advantages, including profits and the accrued value of the business.

In *Hanover Shoe,* United's insistence upon renting rather than selling its machines was deemed a violation of the antitrust laws. Absent the violation, Hanover would have incurred no rental costs, but would have expended money in purchasing and servicing its own machines. Yet, in calculating pre-trebled damages, the district court did not simply deduct from Hanover's rental costs the purchase price and maintenance costs of the machines. Instead, it deducted the *difference* between the purchase price and maintenance costs on the one hand, and the residual value of the machines at the end of the damage period on the other. 245 F.Supp. 258, 287 (M.D. Pa. 1967). That is, in order to arrive at a proper assessment of damages, the court deducted from Hanover's rental costs the *net* outlay the company would have had to make in securing the financial advantages of purchased machines.

The district court's pre-trebled assessment of damages may be reflected algebraically, by the formula D = R−(a=b), where:

"D" = pre-trebled damages;

"R" = total rents and royalties paid by Hanover during the complaint period;

"a" = the purchase price to Hanover of the machines it would have bought in 1939 (the beginning of the complaint period) or in any subsequent year when additional machines or replacement machines would have been acquired, plus the expenses Hanover would have incurred in servicing those machines;[2] and "b" = the residual value of (1) machines deemed to have been disposed of at the end of an assumed

[2] For the sake of clarity, I have taken what the district court in *Hanover Shoe* called "S", and incorporated it into "a".

life expectancy, and (2) machines on hand in September, 1955 (the date of the commencement of the action).

245 F. Supp. at 287-89. The Supreme Court affirmed this assessment. 392 U.S. 481 (1968).

The majority opinion on damages *ignores* component "b". If, as the majority effectively concludes, "a" is the 1980 difference in worth between the Los Angeles and Oakland opportunities, then "b" must be the 1982 (*i.e.*, "residual") value of the difference in worth between the opportunities. Applying the *Hanover Shoe* rationale here, in order to reflect accurately the net outlay that the Raiders would have had to make in securing the financial advantages of the move to Los Angeles, we should deduct from lost profits not "a", but the *difference* between "a" and "b". That is, rather than trebling [R–a] as the majority does, one should treble [R–(a–b)] where:

"R" = lost financial advantages between 1980 and 1982;

"a" = the 1980 value of the Los Angeles opportunity minus the 1980 value of the Oakland opportunity; and

"b" = the 1982 value of the Los Angeles opportunity minus the 1982 value of the Oakland opportunity.

In failing to account for the 1982 (*i.e.*, "residual") value of the difference in worth between the Los Angeles and Oakland opportunities,[3] the majority underestimates the Raiders' damages.[4]

Beyond its failure to calculate properly the net outlay the Raiders would have been required to make in moving to Los Angeles in 1980 and operating there through 1982, the majority also fails to calculate properly the financial advantages the Raiders lost by virtue of not being able to move in 1980.[5] The antitrust laws provide for the trebled recovery of *all* financial advantages the plaintiff would have gained absent the unlawful activities of the defendant. *See Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 47 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972). Consistent with that principle, the Raiders' pre-trebled recovery should reflect not

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[3] In its footnote 8, the majority offers no support for the contention that the difference in worth between the Los Angeles and Oakland opportunities has no "residual" value in 1982. Indeed, by deducting the 1980 value of the Oakland opportunity from the 1980 value of the Los Angeles opportunity before offsetting, the majority implicitly acknowledges that the Oakland opportunity had a "residual" value in 1980. Following the majority's reasoning, I find it inexplicable that the Los Angeles opportunity would not similarly possess a "residual" value in 1982.

In the majority's own words:

> Unquestionably, when the Raiders moved to Los Angeles, they appropriated for themselves the expansion value that had accumulated in Los Angeles. Although by moving out of Oakland the Raiders "gave back" an expansion opportunity [*i.e.*, a residual value] to the NFL, the uncontradicted testimony at trial showed the Los Angeles market to be a significantly more lucrative franchise opportunity.

Ante at 30. In short, the majority's footnote 8 is inconsistent with its own offset calculation in the body of the opinion.

[4] That is to say, the majority overestimates the net outlay (a–b) the Raiders would have had to make in securing the financial advantages of the Los Angeles opportunity from 1980 to 1982.

[5] Here, I am referring to all lost financial advantages other than the increase in the value of the opportunities as reflected in the calculation of "a" and "b".

only the lost profits from 1980 to 1982, but also the extent to which the increase in value of the business during the same period would have been greater in Los Angeles than it actually was in Oakland.[6]

In *Fishman v. Estate of Wirtz,* 594 F. Supp. 853 (N.D. Ill. 1984), a case strikingly similar to our own, the plaintiff was unlawfully precluded from purchasing a sports franchise. The district court included in pre-trebled damages both lost profits *and* the increase in the value of the business during the period of the violation.[7] Similarly, in *Magnus Petroleum Co. v. Skelly Oil Co.*, 446 F. Supp. 874 (E.D. Wis. 1978), *rev'd on other grounds*, 599 F.2d 196 (7th Cir.), *cert. denied*, 444 U.S. 916 (1979), the district court allowed a corporation which had been unlawfully prevented from acquiring a business to recover three times the sum of both lost profits from the date of the attempted acquisition until the date of trial, *and* the increase in the value of the business' goodwill during that same period. 446 F. Supp. at 882-83. *See also Story Parchment Co. v. Paterson Co.,* 282 U.S. 555, 561 (1931) (antitrust plaintiff's damages include both (1) the difference between the profits actually realized by the injured party and the profits it would have realized but for the unlawful acts complained of; *and* (2) the diminished value of its business as a result of such acts); *Atlas Building Products Co. v. Diamond Block & Gravel Co.,* 269 F.2d 950, 958-59 (10th Cir. 1959) (same), *cert. denied,* 363 U.S. 843 (1960): *Photovest Corp. v. Fotomat Corp.,* 1977-1 Trade Cases (CCH) ¶ 61,529 (S.D. Ind.)

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[6] Contrary to the majority's assertion in footnote 8 of its opinion, it is not at all apparent that the jury's award included both elements of damages.

[7] In arriving at its assesment of pre-trebled damages, the court actually calculated the net value of the business as of the time of trial, added the monies distributed to the conspirator's stockholders during the violation period, and then subtracted the monies expended by its stockholders during that time. 594 F. Supp. at 861. Because the difference between monies expended and distributed accounts for both the price the plaintiff would have paid for the franchise when it was sold to the conspirator, and its net profit or loss during the violation period, the court's calculation of damages was exactly as I propose here.

(assessing pre-trebled damages of profits lost during antitrust violation *plus* difference between what business would have been worth absent a violation and what it was actually worth at end of damage period), *aff'd in relevant part,* 606 F.2d 704 (7th Cir. 1979), *cert. denied,* 445 U.S. 917 (1980); *Atlantic City Electric Co. v. General Electric Co.,* 226 F. Supp. 59, 61 (S.D.N.Y. 1964) (antitrust plaintiff entitled to recover lost profits *and* lost value of investment), *appeal denied,* 337 F.2d 844 (2d Cir. 1964).

Perhaps the point is best illustrated by supposing that the Raiders had moved to Los Angeles in 1980, and then realized the appreciation in value of their business by selling the franchise in 1982. The financial gain attributable solely to the move would be: (1) the difference between the profits they made in Los Angeles from 1980 to 1982 and those they would have made in Oakland during the same period; and (2) the extent to which the increase in value of the business from 1980 to 1982 was greater than what the increase in value of the business would have been had they remained in Oakland. The majority ignores the second of the two financial advantages the Raiders would have secured by moving to Los Angeles in 1980 and operating there through 1982.

B. *Perma-Life* Does Not Apply To This Case

I agree with the majority that *Perma-Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134 (1968), simply does not apply to this case. The majority correctly concludes that the jury found Rule 4.3 illegal only as applied to the Raiders' move. *See ante* at 26. Consequently, the Raiders were *not* a party to the restraint, and the fault-based offset theory of *Perma-Life* is inapplicable.[8]

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[8] Even were we to find Rule 4.3 illegal per se, I question the majority's dicta that *Perma-Life* supports offsetting the value of a remedy before trebling. The majority's view seems to be a significant extension, unsupported by any authority of which I am aware, of the offhandedly expressed *Perma-Life* principle. Indeed, *Perma-Life* is most often cited in support of vigorous private enforcement of the antitrust laws. *See, e.g., Illinois Brick Co. v. Illinois,* 431 U.S. 720, 745 (1977). The Supreme Court has stated unequivocally that an antitrust plaintiff may recover only for "antitrust injury, which is to say injury of the type the antitrust

II. Compensation Due the NFL

I also agree that the value of the Los Angeles opportunity, improperly conferred upon the Raiders by the district court's injunction, should be returned to the NFL. However, I do not agree that this value should be offset from pre-trebled actual antitrust damages. By offsetting before trebling in order to compensate the NFL for the lost value of the injunction, the majority effectively requires the Raiders to pay the League three times the value of an opportunity that was only *once* received. It is my view that the overbroad equitable relief the majority attacks is adequately and *properly* addressed by deducting the value of the injunction *after* trebling.[9]

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laws were intended to prevent *and that flows from that which makes defendants' acts unlawful.*" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (emphasis added). In other words, only detriments and benefits *which flow from the antitrust violation itself* should enter into the calculation of antitrust damages. Since it appears that any "benefits" derived by the Raiders flowed directly from the remedy, and not from the NFL's antitrust scheme, it seems inappropriate to apply a *Perma-Life* offset before trebling the damages.

[9] One can appreciate the fairness of offsetting after trebling in the present case by examining the implications of a slight variation of the facts. What if the Raiders had not sought injunctive relief? In that case, there would be no question of offsetting the value of an equitable remedy. First, the Raiders would receive three times their actual antitrust damages (*i.e.*, three times the lost financial advantages between 1980 and 1982). Only afterwards would the court prevent the ongoing antitrust violation by prohibiting the restraint of the move, but permitting the NFL to charge the Raiders for the value of the move.

In a sense, the mistake the majority commits can be characterized as one of blurring together the distinct benefits conferred by the injunction. First, the injunction prevented an *ongoing* antitrust violation. Second, it effectively conferred upon the Raiders the *value* of the 1982 difference in worth between the Los Angeles and Oakland opportunities, for which the Raiders might have otherwise been charged. The remedy in this case should have been the trebled value of the lost financial advantages plus the right to *purchase* the opportunity to play football in Los Angeles. The amount to which the NFL was entitled incident to the move, improperly conferred upon the Raiders, can be *returned*; but to return

This case presents a unique situation. Pursuant to its equitable powers, the district court issued an injunction against the antitrust violator. That injunction prohibited the NFL's ongoing, illegal restraint of the Oakland Raiders' move into Los Angeles. After liability attached, and the move had been made, this court raised *sua sponte* the issue of whether to deduct the value of the district court's injunction (the value of the opportunity to play football in Los Angeles less the value of the opportunity to play football in Oakland) from the pre-trebled antitrust damages. In addressing this issue of first impression, the majority has failed to seek guidance from cases involving related policy concerns.

In all of the cases discussed below, the governing principle is that the court should *separately* assess all offsets which are not related to the pre-trebled damage calculation. That is, offsets which do not flow from the violation itself should be deducted *after* trebling.[10]

A. The Policy Concerns That Motivated Both the *Flintkote* Decision and the Numerous Antitrust Settlement Cases Which Followed It, Apply to this Case

It is by now well-established that if an antitrust plaintiff settles with one defendant, the amount of the settlement is to be set off *after* damages against the remaining defendants have been trebled, and *not before*.[11] The Ninth Circuit established this rule in *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 397-98 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). Other courts have adopted it as well. *See, e.g., Burlington Industries v. Milliken & Co.*, 690 F.2d 380, 393 (4th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983); *Hydrolevel Corp. v. ASME*, 635 F.2d 118, 130 (2d Cir. 1980), *aff'd on other grounds*, 456 U.S. 556 (1982); *Baughman v.*

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this amount, the Raiders need only return it *once, after* trebling. Offsetting before trebling would result in a *treble* return for an improper remedy that was only *once* received.

[10] In *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert denied*, 405 U.S. 955 (1972), the offset flowed from the violation.

[11] Obviously, this rule applies only when *all* of the defendants are jointly and severally liable for the antitrust damages.

Cooper-Jarrett, Inc., 530 F.2d 529, 534 (3d Cir.), *cert denied sub nom. Wilson Freight Forwarding Co. v. Baughman*, 429 U.S. 825 (1976); *Wainwright v. Kraftco Corp.*, 58 F.R.D. 9, 12 (N.D. Ga. 1973); *Vandevelde v. Put & Call Brokers & Dealers Ass'n.*, 344 F. Supp. 157, 162 (S.D.N.Y. 1972); *Semke v. Enid Automobile Dealers Ass'n.*, 320 F. Supp. 445, 446-67 (W.D. Okla. 1970), *rev'd on other grounds but specifically approved on this point*, 456 F.2d 1361, 1371 (10th Cir. 1972).

In *Flintkote*, the Ninth Circuit provided three persuasive reasons for deducting settlement proceeds after trebling damages. 246 F.2d at 397-98. First, the antitrust laws provide that the plaintiff should receive three times the actual antitrust damages. If a court deducts settlement proceeds before trebling, the plaintiff's total award would be less than what the law requires. Second, Congress designed the antitrust laws to encourage suits by private plaintiffs. Offsetting before trebling would diminish the statutory incentive through judicial construction. Third, offsetting before trebling would discourage plaintiffs from settling, for every dollar received in settlement would result in a three dollar reduction in the final judgment. *See also Burlington Industries*, 690 F.2d at 393; *Hydrolevel*, 635 F.2d at 130; Note, *Contribution and Antitrust Policy*, 78 Mich. L. Rev. 889, 906 n.87 (1980). While the third concern does not apply to the question of when to offset the value of the district court's injunction, the first and second clearly do. Accordingly, we should heed the plain language of *Flinkote:*

> [A] niggardly construction of the treble damage provisions would do violence to the clear intent of Congress. The private antitrust action is an important and effective method of combatting unlawful and destructive business practices. The private suitor complements the Government in enforcing the antitrust laws. The treble damage provision was designed to foster and stimulate the interest of private persons in maintaining a free and competitive economy. Its efficacy should not be weakened by judicial construction.

246 F.2d at 398.

Admittedly, in *Flintkote, Burlington Industries, Hydrolevel, Baughman, Wainwright, Vandevelde,* and *Semke,* the offsets represented settlements by defendants whereas, here, the offset under consideration is the value of an injunction. Nonetheless, I find no support in authority or reason for the contention that this factual distinction is material. Thus, these cases reinforce my belief that we should offset *after* trebling.

B. Analogies to Either (1) the Sole Antitrust Case Involving Both a Counterclaim and an Offset Where Plaintiff Did Not Contribute to His Antitrust Injury, or (2) Cases Involving Violations of Orders Setting Rental Ceilings, Suggest the Same Result: Offset After Trebling

Of the antitrust cases involving offsets where the plaintiff did not participate in the antitrust scheme,[12] only one case deals with counterclaims rather than settlements. In *Jerard Associates v. Stanley Words,* 1966 Trade Cases (CCH) ¶ 71,820 (S.D.N.Y.), the court held that the rationale of *Flintkote* applied equally well as counterclaims and, thus, decided to offset after trebling. The court went on to say: "We see no reason in law or justice why we should emasculate the treble damage provision by artificially trebling defendant's counterclaim . . . . " One might equally well remark in the present context that there appears to be no reason in law or justice why this court should emasculate the treble damage provision by deducting the value of the injunction before trebling—*i.e.,* artificially trebling the value of the injunction. Indeed, in *Jerard,* the court specifically stated that "[t]he purpose of the treble damage provision requires that *any* set-off to an antitrust judgment be deducted after trebling because a narrow construction of § 4 would do violence to the congressional purpose of aiding the enforcement of the antitrust laws by providing an incentive for private antitrust actions . . . [citations omitted, emphasis added]."

Another analogy may be drawn to cases dealing with violations of orders setting rental ceilings under the Emergency Price

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[12] In *Siegel v. Chicken Delight, Inc.,* 448 F.2d 43 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972), the plaintiff *did* participate in the antitrust scheme.

Controls acts of World War II. Under those acts, courts awarded treble damages to the tenants of landlords who willfully violated rental ceiling orders. The cases held that actual damages should be trebled first, and that only afterwards should the amount of any unpaid rent be deducted from the trebled figure. In other words, offsets which do not flow from the violation itself should occur only *after* damages have been trebled. *See, Waters v. Turner,* 76 F. Supp. 279 (E.D. Pa. 1948); *Sampson v. Thomas,* 76 F. Supp. 691 (E.D. Mich. 1948).

Together with *Flintkote* and *Jerard,* these cases demonstrate that where the law has a punitive objective in trebling compensatory damages, offsets from the judgment must be made *after* the actual damages are trebled in order to serve that objective properly. The antitrust law applicable to the present case, 15 U.S.C. § 15, provides that the plaintiff "shall recover threefold the damages by him sustained." This court should have followed the Ninth Circuit's decision in *Flintkote* by holding that the purpose of those words would best be carried out by offsetting the value of the injunction after the jury verdict had been trebled.

Appendix C

In the United States Court of Appeals
for the Ninth Circuit

Nos. 82-5572, 82-5573, 82-5574, 82-5664, 82-5665, 83-5714,
83-5732, 83-5938

D.C. No. CV 78-3523 HP

Los Angeles Memorial Coliseum Commission,
Plaintiff-Appellee,

vs.

National Football League,
an unincorporated association, et al.,
Defendants/Cross-Defendants-Appellants/
Cross-Appellees,

and

New England Patriots Football Club, Inc.,
Highwood Service, Inc., Empire Sports, Inc.,
Houston Oilers, Inc., New York Jets
Football Club, Inc., and Chargers Football Company,
Kansas City Chiefs Football Club, Inc., and
Miami Dolphins, Ltd.,
Defendants/Cross-Defendants-Appellants,

and

Los Angeles Rams Football Co.,
Defendant/Cross-Defendant-Appellant/
Cross-Appellee,

and

Oakland-Alameda County Coliseum, Inc.,
Intervenor/Defendant-Appellant/Cross-Appellee,

vs.

Oakland Raiders, Ltd.,
Cross-Claimant-Appellee/Cross-Appellant.

OPINION

[Filed Feb. 28, 1984]

Appeals from the United States District Court
for the Central District of California
The Honorable Harry Pregerson, Circuit Judge, Presiding
by designation
Argued and submitted April 7, 1983

Before: Anderson and Nelson, Circuit Judges, and Williams, District Judge.*

J. BLAINE ANDERSON, Circuit Judge:

These appeals involve the hotly contested move by the Oakland Raiders, Ltd. professional football team from Oakland, California, to Los Angeles, California. We review only the liability portion of the bifurcated trial; the damage phase was concluded in May 1983 and is on a separate appeal. After a thorough review of the record and the law, we affirm.

I. FACTS

In 1978, the owner of the Los Angeles Rams, the late Carroll Rosenbloom, decided to locate his team in a new stadium, the "Big A," in Anaheim, California. That left the Los Angeles Coliseum without a major tenant. Officials of the Coliseum then began the search for a new National Football League occupant. They inquired of the League Commissioner, Pete Rozelle, whether an expansion franchise might be located there but were told that at the time it was not possible. They also negotiated with existing teams in the hope that one might leave its home and move to Los Angeles.

The L.A. Coliseum ran into a major obstacle in its attempts to convince a team to move. That obstacle was Rule 4.3 of Article IV of the NFL Constitution. In 1978, Rule 4.3 required unanimous approval of all the 28 teams of the League whenever a team (or in the parlance of the League, a "franchise") seeks to relocate in the home territory of another team. Home territory is defined in Rule 4.1 as

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* The Honorable Spencer M. Williams, United States District Judge for the Northern District of California, sitting by designation.

> the city in which [a] club is located and for which it holds a franchise and plays its home games, and includes the surrounding territory to the extent of 75 miles in every direction from the exterior corporate limits of such city. . . .

In this case, the L.A. Coliseum was still in the home territory of the Rams.

The Coliseum viewed Rule 4.3 as an unlawful restraint of trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and brought this action in September of 1978. The district court concluded, however, that no present justiciable controversy existed because no NFL team had committed to moving to Los Angeles. 468 F.Supp. 154 (C.D. Cal. 1979).

The NFL nevertheless saw the Coliseum's suit as a sufficient threat to warrant amending Rule 4.3. In late 1978, the Executive Committee of the NFL, which is comprised of a voting member of each of the 28 teams, met and changed the rule to require only three-quarters approval by the members of the League for a move into another team's home territory.[1]

Soon thereafter, Al Davis, managing general partner of the Oakland Raiders franchise, stepped into view. His lease with the Oakland Coliseum had expired in 1978. He believed the facility needed substantial improvement and he was unable to persuade

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[1] Rule 4.3 originally read:

> Any transfer of an existing franchise to a location within the home territory of any other club shall only be effective if approved by a unanimous vote; any other transfer shall only be effective if approved by the affirmative vote of not less than three-fourths or 20, whichever is greater, of the member clubs of the League.

After its 1978 amendment, Rule 4.3 states:

> The League shall have exclusive control of the exhibition of football games by member clubs within the home territory of each member. No member club shall have the right to transfer its franchise or playing site to a different city, either within or outside its home territory, without prior approval by the affirmative vote of three-fourths of the existing member clubs of the League.

the Oakland officials to agree to his terms. He instead turned to the Los Angeles Coliseum.

Davis and the L.A. Coliseum officials began to discuss the possibility of relocating the Raiders to Los Angeles in 1979. In January, 1980 the L.A. Coliseum believed an agreement with Davis was imminent and reactivated its lawsuit against the NFL, seeking a preliminary injunction to enjoin the League from preventing the Raiders' move. The district court granted the injunction, 484 F. Supp. 1274 (1980), but this court reversed, finding that an adequate probability of irreparable injury had not been shown. 634 F.2d 1197 (1980).

On March 1, 1980, Al Davis and the Coliseum signed a "memorandum of agreement" outlining the terms of the Raiders' relocation in Los Angeles. At an NFL meeting on March 3, 1980, Davis announced his intentions. In response, the League brought a contract action in state court, obtaining an injunction preventing the move. In the meantime, the City of Oakland brought its much-publicized eminent domain action against the Raiders in its effort to keep the team in its original home. The NFL contract action was stayed pending the outcome of this litigation, but the eminent domain action is still being prosecuted in the California courts.

Over Davis' objection that Rule 4.3 is illegal under the antitrust laws, the NFL teams voted on March 10, 1980, 22-0 against the move, with five teams abstaining. That vote did not meet the new Rule 4.3's requirement of three-quarters approval.

The Los Angeles Memorial Coliseum Commission then renewed its action against the NFL and each member club. The Oakland-Alameda County Coliseum, Inc., was permitted to intervene. The Oakland Raiders cross-claimed against the NFL and is currently aligned as a party plaintiff.

The action was first tried in 1981, but resulted in a hung jury and mistrial. A second trial was conducted, with strict constraints on trial time. The court was asked to determine if the NFL was a "single business entity" and as such incapable of combining or conspiring in restraint of trade. Referring to the reasoning in its opinion written for the first trial, 519 F.Supp. 581, 585 (1981),

the court concluded the League was not a "single entity." Vol. 12 Clerk's Record #931.

The district court denied the NFL's motions for change of venue, but did employ a detailed voir dire of the jury pool and of the jurors eventually empaneled. The trial was bifurcated so the jury could first determine liability. In the liability portion, counsel were limited to 40 hours of trial time per side in an effort to narrow the matters presented.

The trial was conducted and witnesses called, including owners of various NFL member teams and the League Commissioner, Pete Rozelle. The jury was instructed on the antitrust liability issues and sent out May 6, 1982. On May 7, 1982, the jury returned a verdict in favor of the Los Angeles Memorial Coliseum Commission and the Oakland Raiders on the antitrust claim and for the Raiders on their claim of breach of the implied promise of good faith and fair dealing. The court then continued the case to September 20, 1982, to begin the damages trial.

On June 14, 1982, the court issued its judgment on the liability issues, permanently enjoining the NFL and its member clubs from interfering with the transfer of the Oakland Raiders' NFL franchise from the Oakland Coliseum to the Los Angeles Memorial Coliseum. The court determined, in addition, that there was "no just reason for delay in entering this final judgment on plaintiff's and cross-claimant's claim for declaratory and equitable relief, and . . . expressly direct[ed] this final judgment be entered." Vol. 16 Clerk's Record # 2090. The NFL and its original clubs immediately appealed the permanent injunction (No. 82-5572); the original clubs of the American Football League also appealed (No. 82-5573), as did the Los Angeles Rams Football Co. (No. 82-5574)and the Oakland-Alameda County Coliseum (No. 82-5664). The Oakland Raiders cross-appealed challenging six orders entered by the court in 1981 and 1982 (Nos. 82-5665 and 83-5398). The NFL and Oakland Coliseum have also appealed the failure of the district court to grant their post-trial motions. (Nos. 83-5714 and 83-5732).

The damages trial was completed in May 1983 with the jury returning a verdict awarding the Raiders $11.55 million and the

Los Angeles Coliseum $4.86 million. These awards were trebled by the district court pursuant to 15 U.S.C. § 15. The NFL and the other defendants have appealed. (Nos. 83-5907, 83-5908 and 83-5909). This panel will hear and decide the damage appeals. But, because these appeals were expedited, the damage appeals will be decided in a later opinion after briefing, possible argument, and submission.[2]

II. SHERMAN ACT § 1

The jury found that Rule 4.3 violates § 1 of the Sherman Act, 15 U.S.C. § 1. Section 1 literally prohibits every agreement, conspiracy, or other concerted activity in restraint of trade. Since Congress could not have intended that courts invalidate "every" such agreement, *see United States v. Joint Traffic Assn.*, 171 U.S. 505, 43 L.Ed. 259 (1898), most restraints are analyzed under the so-called "rule of reason." *Standard Oil of New Jersey v. United States*, 221 U.S. 1, 55 L.Ed. 619 (1911). The rule of reason requires the factfinder to decide whether under all the circumstances of the case the agreement imposes an unreasonable

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[2] Once in this court, the parties have continued their practice of affirmative lawyering and have filed multiple motions. The motions that have not been resolved up until this point are here discussed.

First, the NFL has moved this court for permission to supplement the record on the question of the effect of the stipulation entered into by the parties concerning relevant market. We grant the motion and will discuss the effect of the stipulation with the merits section, *infra*.

Second, the Raiders agreed to drop its cross-appeal if the judgment of antitrust liability and injunction is affirmed. As we are affirming that judgment, we dismiss the Raiders' cross-appeals, Nos. 82-5665 and 83-5938. It is unnecessary to address the NFL's and Oakland Coliseum's motions on this subject.

Finally, the Raiders have moved to dismiss the NFL's and Oakland Coliseum's appeals from the district court's denial of their Fed. R. Civ. P. 60(b) motions. This motion is granted. The district court lacked jurisdiction to consider this motion; its denial of the motion is not an appealable order. *Smith v. Lujan*, 588 F.2d 1304, 1307 (9th Cir. 1979). Also, the district court indicated no desire to entertain the motions if this court remanded this case back to it. *Id.* The appeals in Nos. 83-5714 and 83-5732 are dismissed.

restraint on competition. *Arizona v. Maricopa County Medical Society,* ____ U.S. ____ , , 73 L.Ed. 48, 58 (1982).

Standard Oil, however, reconciled the earlier categorical prohibition with its own rule of reason by declaring that some restraints remain inherently unreasonable. 221 U.S. at 64-65. When judicial experience with a particular kind of restraint enables a court to predict with certainty that the rule of reason will condemn that restraint, the court will hold that the restraint is per se unlawful. *See United States v. Topco Associates, Inc.,* 405 U.S. 596, 31 L.Ed.2d 515 (1972). In other cases where judges lack the expert understanding of an industry's market structure and behavior to have such certainty, the court will consider facts peculiar to the industry, the nature of the restraint and its effect to determine whether that restraint promotes or restrains competition. *See Chicago Board of Trade v. United States,* 246 U.S. 231, 238, 62 L.Ed. 683, 687 (1918).

In the present case, the district judge found that the unique nature of the business of professional football made application of a per se rule inappropriate. 468 F.Supp. 154, 164-168 (1979). The court therefore instructed the jury that it was to decide whether Rule 4.3 was an unreasonable restraint of trade. The parties do not contest the appropriateness of this basic reasonableness inquiry. The NFL, however, raises two arguments against the lower court's judgment finding section 1 liability. First, the NFL contends that it is a single entity incapable of conspiring to restrain trade under section 1. Second, it insists that rule 4.3 is not an unreasonable restraint of trade under section 1.

A. Single Entity

The NFL contends the league structure is in essence a single entity, akin to a partnership or joint venture, precluding application of Sherman Act section 1 which prevents only contracts, combinations or conspiracies in restraint of trade. The Los Angeles Coliseum and Raiders reject this position and assert the League is composed of 28 separate legal entities which act independently.

The district court directed a verdict for plaintiffs on this issue and as a preliminary matter the NFL states the jury should have

been allowed to decide the question. A directed verdict may be granted pursuant to Fed. R. Civ. P. 50(a) when, viewing the evidence in a light most favorable to the nonmoving party, the testimony and all the inferences that the jury could justifiably draw therefrom are insufficient to support any other finding. *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 661 (9th Cir.), *cert. denied*, 375 U.S. 922, 11 L.Ed.2d 165 (1963). When there is no substantial evidence to support a claim, i.e., only one conclusion can be drawn, the court must direct a verdict, even in an antitrust case. *Cleary v. Nat'l Distillers and Chemical Corp.*, 505 F.2d 695, 696 (9th Cir. 1974). Our review is *de novo*. *Santa Clara Valley Distributing Co. v. Pabst Brewing Co.*, 556 F.2d 942, 944 (9th Cir. 1977).

It is true, as the NFL contends, that the nature of an entity and its ability to combine or conspire in violation of § 1 is a fact question. *Murray v. Toyota Motor Distributors, Inc.*, 664 F.2d 1377, 1379 (9th Cir.), *cert. denied*, 457 U.S. 1106, 73 L.Ed.2d 1314 (1982). It would be reversible error, then, to take the issue from the jury if reasonable minds could differ as to its resolution. *Id.* Here, however, the material facts are undisputed. How the NFL is organized and the nature and extent of cooperation among the member clubs is a matter of record; the NFL Constitution and Bylaws contain the agreement. Based on the undisputed facts and the law on this subject, the district court correctly decided this issue.

The district court cited three reasons for rejecting the NFL's theory. Initially, the court recognized the logical extention of this argument was to make the League incapable of violating Sherman Act § 1 in every other subject restriction—yet courts have held the League violated § 1 in other areas. 519 F.Supp. at 583. Secondly, other organizations have been found to violate § 1 though their product was "just as unitary . . . and requires the same kind of cooperation from the organization's members." *Id.* Finally, the district court considered the argument to be based upon the false premise that the individual NFL "clubs are not separate business entities whose products have an independent value." 519 F.Supp. at 584. We agree with this reasoning.

NFL rules have been found to violate § 1 in other contexts. Most recently, the Second Circuit analyzed the NFL's rule preventing its member-owners from having ownership interests in other professional sports clubs. *North American Soccer League v. National Football League*, 670 F.2d 1249, 1257-1259 (2d Cir.), *cert. denied*, ____ U.S. ____, 74 L.Ed.2d 639 (1982). It recognized the cooperation necessary among league members, even characterizing the NFL as a joint venture, but nonetheless applied rule of reason analysis and found the cross-ownership rule violated § 1. Other courts have held the League rules governing player contracts violate § 1 of the Sherman Act. *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976); *Kapp v. NFL*, 390 F.Supp. 73 (N.D. Cal. 1974); *appeal vacated*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907, 60 L.Ed.2d 375 (1979). As noted by the Second Circuit in *Soccer League*, a finding of single entity status would immunize the NFL from § 1 scrutiny:

> To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects. Moreover, the restraint might be one adopted more for the protection of individual league members from competition than to help the league.

670 F.2d at 1257.

Cases applying the single entity or joint venture theory in other business areas also contradict the NFL's argument. As stated by the Supreme Court:

> Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labelling the project a "joint venture." Perhaps every agreement and combination in restraint of trade could be so labeled.

Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598, 95 L.Ed. 1199, 1206 (1951). *Timken* involved an allegation of

territorial division among three companies that shared partial common ownership. In *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-142, 20 L.Ed.2d 982, 992 (1968), the Court reiterated that common ownership will not suffice to preclude the application of § 1. While these cases and others have been the subject of some criticism, *see, e.g.*, M. Handler and T. Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo Law Review 23 (1981), they remain the law. In recognition that a broad application of *Timken* and *Perma Life* could subvert legitimate procompetitive business associations, this circuit has found the threshold requirement of concerted activity missing among "multiple corporations operated as a single entity" when "corporate policies are set by one individual or by a parent corporation." *General Business Systems v. North American Philips Corp.*, 699 F.2d 965, 980 (9th Cir. 1983); *see Thomsen v. Western Electric Co.*, 680 F.2d 1263, 1266 (9th Cir.), *cert. denied*, ___ U.S. ___, 74 L.Ed.2d 387 (1982); *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617 (9th Cir. 1979), *cert. denied*, 447 U.S. 906, 64 L.Ed.2d 855 (1980). The facts make it clear the NFL does not fit within this exception. While the NFL clubs have certain common purposes, they do not operate as a single entity. NFL policies are not set by one individual or parent corporation, but by the separate teams acting jointly.

It is true the NFL clubs must cooperate to a large extent in their endeavor in producing a "product"—the NFL season culminating in the Super Bowl. The necessity that otherwise independent businesses cooperate has not, however, sufficed to preclude scrutiny under § 1 of the Sherman Act. In *Associated Press v. United States*, 326 US. 1, 89 L.Ed. 2013 (1945), the Supreme Court rejected the assertion that the AP was immune from section 1 because it was a necessary cooperative of independent newspapers which produced a product its individual members could not. *Id.* at 26, 89 L.Ed. at 2034 (Frankfurter, J., concurring). More recently, the Court found the cooperation required among ostensible competitors in arranging blanket licensing of copyrighted songs precluded only a finding of per se illegality; instead, rule of reason analysis was the proper method to determine the legality of the arrangement. *Broadcast Music, Inc. v. Columbia Broadcast System, Inc.*, 441 U.S. 1, 60 L.Ed.2d 1

(1979);[3] *see also Silver v. New York Stock Exchange*, 373 U.S. 341, 10 L.Ed.2d 389 (1963).

The case of *United States v. Sealy, Inc.*, 388 U.S. 350, 18 L.Ed.2d 1238 (1967), is closely on point. Sealy licensed manufacturers to sell bedding products under the Sealy name and allocated territories to the licensees. The facts showed, however, that this arrangement was not vertical but horizontal; the 30 licensees, owning all of the stock of Sealy, controlled all its operations. 388 U.S. at 352-353, 18 L.Ed.2d at 1242. Describing the Sealy organization as a joint venture, the Court nonetheless found it a per se violation of the Sherman Act. *See also United States v. Topco Associates, Inc.*, 405 U.S. 596, 609, 31 L.Ed.2d 515, 526 (1972) (Court finding a per se violation on facts similar to Sealy).

The NFL structure is very similar to that in *Sealy*. The League itself is only in very limited respects an identity separate from the individual teams. It is an unincorporated, not-for-profit, "association." It has a New York office run by the Commissioner, Pete Rozelle, who makes day-to-day decisions regarding League operations. Its primary functions are in the areas of scheduling, resolving disputes among players and franchises, supervising officials, discipline and public relations. The decision involved here on territorial divisions is made by the NFL Executive Committee which is comprised of a representative of each club. Even though the individual clubs often act for the common good of the NFL, we must not lose sight of the purpose of the NFL as stated in Article I of its constitution, which is to "promote and foster the

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[3] On remand in *Broadcast Music* the Second Circuit did not conclude, as the NFL claims, that rule of reason analysis was unnecessary. It found only that it was unnecessary to balance the pro and anticompetitive effects of the blanket licensing arrangement because no anticompetitive effects were proven. *Columbia Broadcasting System, Inc. v. American Society of Composers*, 620 F.2d 930, 934-935 (2d Cir. 1980), *cert. denied*, 450 U.S. 970, 67 L.Ed.2d 621 (1981). As will be discussed below, that reasoning squares with this circuit's view that a showing of anticompetitive effect is a threshold rule of reason consideration. *See Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1373 (9th Cir. 1983).

primary business of League members." Although the business interests of League members will often coincide with those of the NFL as an entity in itself, that commonality of interest exists in every cartel. As in *Sealy*, we must look behind the label proffered by the defendants to determine the substance of the entity in question. 388 U.S. at 353, 18 L.Ed.2d at 1242.

Our inquiry discloses an association of teams sufficiently independent and competitive with one another to warrant rule of reason scrutiny under § 1 of the Sherman Act. The NFL clubs are, in the words of the district court, "separate business entities whose products have an independent value." 519 F.Supp. at 584. The member clubs are all independently owned. Most are corporations, some are partnerships, and apparently a few are sole proprietorships. Although a large portion of League revenue, approximately 90%, is divided equally among the teams, profits and losses are not shared, a feature common to partnerships or other "single entities." In fact, profits vary widely despite the sharing of revenue. The disparity in profits can be attributed to independent management policies regarding coaches, players, management personnel, ticket prices, concessions, luxury box seats, as well as franchise location, all of which contribute to fan support and other income sources.

In addition to being independent business entities, the NFL clubs do compete with one another off the field as well as on to acquire players, coaches, and management personnel. In certain areas of the country where two teams operate in close proximity, there is also competition for fan support, local television and local radio revenues, and media space.

These attributes operate to make each team an entity in large part distinct from the NFL. It is true that cooperation is necessary to produce a football game. However, as the district court concluded, this does not mean, "that each club can produce football games only as an *NFL* member." 519 F.Supp. at 584. This is especially evident in light of the emergence of the United States Football League.

For the foregoing reasons, we affirm the district court's rejection of the NFL's single entity defense.[4] Of course, the singular nature of the NFL will need to be accounted for in discussing the reasonableness of the restriction on team movement, but it is not enough to preclude § 1 scrutiny. The NFL's related argument that Rule 4.3 is valid as a restraint ancillary to a joint venture agreement will be discussed in the rule of reason analysis that follows. Contrary to the NFL's apparent belief, the ancillary restraint doctrine is not independent of the rule of reason. *National Society of Professional Engineers*, 435 U.S. at 689, 55 L.Ed.2d at 648; *see* R. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775, 796-801 (1965).

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[4] One district court case has reached the opposite conclusion in a somewhat similar context. In *San Francisco Seals, Ltd. v. National Hockey League*, 379 F.Supp. 966 (C.D. Cal. 1974), the court upheld the NHL's right to preclude the Seals' proposed move to Vancouver. The court found both that the NHL is a single entity incapable of conspiring in violation of § 1 of the Sherman Act and that the denial of the move had no anticompetitive effect. A recent law review article argues that the court in *Seals* correctly decided the single entity issue. M. Grauer, *Recognition of the National Football League as a Single Entity under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 Mich. L. Rev.1 (1983). Although *Seals* and this article offer persuasive reasons for recognizing the NFL as a single entity, we do not find these reasons so compelling that existing precedent can be ignored or that we should grant this association of 28 independent businesses blanket immunity from attack under § 1 of the Sherman Act. The unitary nature of the NFL can be accounted for by analyzing the competitive harms and benefits of Rule 4.3 under the rule of reason, without impinging on Congress' authority to decide whether a specific industry deserves an exemption from the antitrust laws. *See Jefferson County Pharmaceuticals v. Abbott Laboratories*, ____ U.S. ____, 74 L.Ed.2d 882, 890-91 (1983); *see also United States v. Cooper Corp.*, 312 U.S. 600, 606, 85 L.Ed. 1071, 61 S.Ct. 742 (1941).

B. Rule of Reason

In *Chicago Board of Trade v. United States*, 246 U.S. 231, 238, 62 L.Ed. 683, 687 (1918), Justice Brandeis announced what has become the classic approach used in rule of reason analysis:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

As elaborated upon by this circuit: "Rule of reason analysis calls for a 'thorough investigation of the industry at issue and a balancing of the arrangement's positive and negative effects on competition.' " *Cascade Cabinet*, 710 F.2d at 1373 (quoting *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1050 (9th Cir. 1983)). This balancing process is not applied, however, until after the plaintiff has shown the challenged conduct restrains competition. *Cascade Cabinet*, 710 F.2d at 1373. To establish a cause of action, plaintiff must prove these elements: "(1) An agreement among two or more persons or distinct business entities; (2) Which is intended to harm or unreasonably restrain competition; (3) And which actually causes injury to competition." *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 290 (9th Cir. 1979), *cert. denied*, 447 U.S. 924, 65 L.Ed.2d 1116 (1980); *accord Reid Brothers Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1296 (9th Cir. 1983).

Our rejection of the NFL's single entity defense implicitly recognized the existence of the first element—the 28 member clubs have entered an agreement in the form of the NFL

Constitution and Bylaws. As will be developed in more detail, we have no doubt the plaintiffs also met their burden of proving the existence of the second element. Rule 4.3 is on its face an agreement to control, if not prevent, competition among the NFL teams through territorial divisions. The third element is more troublesome. It is in this context that we discuss the NFL's ancillary restraint argument. Also, a showing of injury to competition requires "[p]roof that the defendant's activities had an impact upon competition in a relevant market," *Kaplan*, 611 F.2d at 291, proof that "is an absolutely essential element of a rule of reason case." *Id.*; *see Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 901 (9th Cir. 1983).

Other courts have applied rule of reason analysis to determine the legality of concerted action undertaken by the NFL and for the most part have found such action illegal. *E.g., North American Soccer League*, 670 F.2d 1249; *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801, 54 L.Ed.2d 59 (1977). The instant case is the first of this type in this circuit, however, and the first in which a member club has questioned the legality of NFL rules.

In a quite general sense, the case presents the competing considerations of whether a group of businessmen can enforce an agreement with one of their co-contractors to the detriment of that co-contractor's right to do business where he pleases. More specifically, this lawsuit requires us to engage in the difficult task of analzying the negative and positive effects of a business practice in an industry which does not readily fit into the antitrust context. Section 1 of the Sherman Act was designed to prevent agreements among competitors which eliminate or reduce competition and thereby harm consumers. Yet, as we discussed in the context of the single entity issue, the NFL teams are not true competitors, nor can they be.

The NFL's structure has both horizontal and vertical attributes. *See, e.g., Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 L.Ed.2d 568 (1977). On the one hand, it can be viewed simply as an organization of 28 competitors, an example of a simple horizontal arrangement. On the other, and to the extent

the NFL can be considered an entity separate from the team owners, a vertical relationship is disclosed. In this sense the owners are distributors of the NFL product, each with its own territorial division. In this context it is clear that the owners have a legitimate interest in protecting the integrity of the League itself. Collective action in areas such as League divisions, scheduling and rules must be allowed, as should other activity that aids in producing the most marketable product attainable. Nevertheless, legitimate collective action should not be construed to allow the owners to extract excess profits. In such a situation the owners would be acting as a classic cartel. Agreements among competitors, i.e., cartels, to fix prices or divide market territories are presumed illegal under § 1 because they give competitors the ability to charge unreasonable and arbitrary prices instead of setting prices by virtue of free market forces. *See United States v. Trenton Potteries Co.*, 273 U.S. 392, 397, 71 L.Ed. 700, 705 (1927); *United States v. Topco Associates,* 405 U.S. at 611, 31 L.Ed.2d at 527-528.

On its face, Rule 4.3 divides markets among the 28 teams, a practice presumed illegal, but, as we have noted, the unique structure of the NFL precludes application of the per se rule. *North American Soccer League,* 670 F.2d at 1258-1259; *see Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1370-1373 (9th Cir. 1983). Instead, we must examine Rule 4.3 to determine whether it reasonably serves the legitimate collective concerns of the owners or instead permits them to reap excess profits at the expense of the consuming public.

1. Relevant Market

The NFL contends it is entitled to judgment because plaintiffs failed to prove an adverse impact on competition in a relevant market. The NFL's claim that it is entitled to judgment notwithstanding the verdict is governed by the same standards as a motion for directed verdict, discussed above. The court is not permitted to account for witness credibility, weigh the evidence or reach a different result it finds more reasonable as long as, viewing the evidence in a light most favorable to the nonmoving party, the jury's verdict is supported by substantial evidence. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014,

1026 (9th Cir. 1981), *cert. denied,* ____ U.S. ____, 74 L.Ed. 61 (1982).

The relevant market provides the basis on which to balance competitive harms and benefits of the restraint at issue. *See Kaplan,* 611 F.2d at 291; *see also Lektro-Vend Corp. v. Vendo Co.,* 660 F.2d 255, 268-269 (7th Cir. 1981), *cert. denied,* 455 U.S. 921, 71 L.Ed.2d 461 (1982). Such evidence is essential in a section 1 case. *See Continental TV, Inc.,* 433 U.S. at 53 n.21, 53 L.Ed.2d at 582, n.21 ("an antitrust policy divorced from market considerations would lack any objective benchmarks").

In the present case, the parties entered a stipulation regarding relevant market evidence because the time allowed for witnesses in the second trial was restricted by the trial court. The stipulation provided that no experts would be called to testify on the subject. Instead, the transcripts and exhibits used by the economic experts were deemed incorporated in the record and admitted in evidence at the retrial, allowing counsel to argue market issues as if the experts had testified before the jury. Our review shows, however, that neither the transcripts nor the exhibits were placed before the jury. We are surprised that in a trial of this magnitude these able attorneys would neglect such important evidence. Upon a careful review of the record, however, we find that testimony of others was sufficient to cover the subject where necessary, and to guide the jury's finding that Rule 4.3 is an unreasonable restraint of trade.

In the antitrust context, the relevant market has two components: the product market and the geographic market. Product market definition involves the

> process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other. A market definition must look at all relevant sources of supply, either actual rivals or eager potential entrants to the market.

Kaplan, 611 F.2d at 292 (quoting *SmithKline Corp. v. Eli Lilly & Co.,* 575 F.2d 1056, 1063 (3d Cir.), *cert. denied,* 439 U.S. 838, 58 L.Ed.2d 134 (1978)). Two related tests are used in arriving at the

product market: first, reasonable interchangeability for the same or similar uses; and second, cross-elasticity of demand, an economic term describing the responsiveness of sales of one product to price changes in another. *Id.* at 291; see 3 J. von Kalinowski, *Antitrust Laws and Trade Regulations,* § 8.02[2] (1983). Similar considerations determine the relevant geographic market, which describes the "economically significant" area of effective competition in which the relevant products are traded. *Kaplan,* 611 F.2d at 292 (quoting *Brown Shoe Co. v. United States,* 370 U.S. 294, 8 L.Ed.2d 510 (1962)).

The claims of the Raiders and the L.A. Coliseum, respectively, present somewhat different market considerations. The Raiders attempted to prove the relevant market consists of NFL football (the product market) in the Southern California area (the geographic market). The NFL argues it competes with all forms of entertainment within the United States, not just Southern California. The L.A. Coliseum claims the relevant market is stadia offering their facilities to NFL teams (the product market) in the United States (the geographic market). The NFL agrees with this geographic market, but argues the product market involves cities competing for all forms of stadium entertainment, including NFL football teams.

That NFL football has limited substitutes from a consumer standpoint is seen from evidence that the Oakland Coliseum sold out for 10 consecutive years despite having some of the highest ticket prices in the League. A similar conclusion can be drawn from the extraordinary number of television viewers—over 100 million people—that watched the 1982 Super Bowl, the ultimate NFL product. NFL football's importance to the television networks is evidenced by the approximately $2 billion they agreed to pay the League for the right to televise the games from 1982-1986. This contract reflects the networks' anticipation that the high number of television viewers who had watched NFL football in the past would continue to do so in the future.

To some extent, the NFL itself narrowly defined the relevant market by emphasizing that NFL football is a unique product which can be produced only through the joint efforts of the 28 teams. Don Shula, coach of the Miami Dolphins, underscored

this point when he stated that NFL football has a different set of fans than college football.

The evidence from which the jury could have found a narrow pro football product market was balanced, however, with other evidence which tended to show the NFL competes in the first instance with other professional sports, especially those with seasons that overlap with the NFL's. On a broader level, witnesses such as Pete Rozelle and Georgia Frontierre (owner of the L.A. Rams) testified that NFL football competes with other television offerings for network business, as well as other local entertainment for attendance at the games.

In terms of the relevant geographic market, witnesses testified, in particular Al Davis, that NFL teams compete with one another off the field for fan support in those areas where teams operate in close proximity such as New York City-New Jersey, Washington, D.C.-Baltimore, and formerly San Francisco-Oakland. Davis, of course, had firsthand knowledge of this when his team was located in Oakland. Also, the San Francisco Forty-Niners and the New York Giants were paid $18 million because of the potential for harm from competing with the Oakland Raiders and the New York Jets, respectively, once those teams joined the NFL as a result of the merger with the American Football League. Al Davis also testified at length regarding the potential for competition for fan support between the Raiders and the Los Angeles Rams once his team relocated in Los Angeles.

Testimony also adequately described the parameters of the stadia market. On one level, stadia do compete with one another for the tenancy of NFL teams, Such competition is shown by the Rams' move to Anaheim. Carroll Rosenbloom was offered what he considered to be a more lucrative situation at the Big A Stadium, so he left the L.A. Coliseum. In turn, the L.A. Coliseum sought to lure existing NFL teams to Los Angeles. Competition between the L.A. Coliseum and the Oakland Coliseum for the tenancy of the Raiders resulted.

It is true, as the NFL argues, that competition among stadia for the tenancy of professional football teams is presently limited. It is limited, however, because of the operation of Rule 4.3. Prior to

this lawsuit, most teams were allowed to relocate only within their home territory. That is why Carroll Rosenbloom could move his team to Anaheim. This is not to say the *potential* for competition did not previously exist. There was evidence to the effect that the NFL in the past remained expressly noncommitted on the question of team movement. This was done to give owners a bargaining edge when they were renegotiating leases with their respective stadia. The owner could threaten a move if the lease terms were not made more favorable.

The NFL claims that it is places, not particular stadia, that compete for NFL teams. This is true to a point because the NFL grants franchises to locales (generally a city and a 75 mile radius extending from its boundary). It is the individual stadia, however, which are most directly impacted by the restrictions on team movement. A stadium is a distinct economic entity and a territory is not.

It is also undoubtedly true, as the NFL contends, that stadia attempt to contract with a variety of forms of entertainment for exhibition in their facilities. In the case of the L.A. Coliseum, this includes college football, concerts, motorcycle races and the like. An NFL football team, however, is an especially desirable tenant. The L.A. Coliseum, for example, had received the highest rent from the Rams when they played there. We find that this evidence taken as a whole provided the jury with an adequate basis on which to judge the reasonableness of Rule 4.3 both as it affected competition among NFL teams and among stadia.

We conclude with one additional observation. In the context of this case in particular, we believe that market evidence, while important, should not become an end in itself. Here the exceptional nature of the industry makes precise market definition especially difficult. To a large extent the market is determined by how one defines the entity: Is the NFL a single entity or partnership which creates a product that competes with other entertainment products for the consumer (e.g., television and fans) dollar? Or is it 28 individual entities which compete with one another both on and off the field for the support of the consumers of the more narrow football product? Of course, the NFL has attributes of both examples and a variety of evidence

was presented on both views. In fact, because of the exceptional structure of the League, it was not necessary for the jury to accept absolutely either the NFL's or the plaintiffs' market definitions. Instead, the critical question is whether the jury could have determined that Rule 4.3 reasonably served the NFL's interest in producing and promoting its product, i.e., competing in the entertainment market, or whether Rule 4.3 harmed competition among the 28 teams to such an extent that any benefits to the League as whole were outweighed. As we find below, there was ample evidence for the jury to reach the latter conclusion.

2. The History and Purpose of Rule 4.3

The NFL has awarded franchises exclusive territories since the 1930's. In the early days of professional football, numerous franchises failed and many changed location in the hope of achieving economic success. League members saw exclusive territories as a means to aid stability, ensuring the owner who was attempting to establish an NFL team in a particular city that another would not move into the same area, potentially ruining them both.

Rule 4.3 is the result of that concern. Prior to its amendment in 1978, it required unanimous League approval for a move into another teams's home territory. That, of course, gave each owner an exclusive territory and he could vote against a move into his territory solely because he was afraid the competition might reduce his revenue. Notably, however, the League constitution required only three-quarters approval for all other moves. The 1978 amendment removed the double-standard, and currently three-quarters approval is required for all moves.

That the purpose of Rule 4.3 was to restrain competition among the 28 teams may seem obvious and it is not surprising the NFL admitted as much at trial. It instead argues that Rule 4.3 serves a variety of legitimate League needs, including ensuring franchise stability. We must keep in mind, however, that the Supreme Court has long rejected the notion that "ruinous competition" can be a defense to a restraint of trade. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 84 L.Ed. 1129, 1167 (1940). Conversely, anticompetitive purpose alone is not enough

to condemn Rule 4.3. *See Chicago Board of Trade,* 246 U.S. at 238, 62 L.Ed. at 687. The rule must actually harm competition, and that harm must be evaluated in light of the procompetitive benefits the rule might foster. *See Kaplan,* 611 F.2d at 291.

3. Ancillary Restraints and the Reasonableness of Rule 4.3

The NFL's primary argument is that it is entitled to judgment notwithstanding the verdict because under the facts and the law, Rule 4.3 is reasonable under the doctrine of ancillary restraints. The NFL's argument is inventive and perhaps it will breathe new life into this little used area of antitrust law, but we reject it for the following reasons.

The common-law ancillary restraint doctrine was, in effect, incorporated into Sherman Act section 1 analysis by Justice Taft in *United States v. Addyston Pipe & Steel Co.,* 85 F. 271 (6th Cir. 1898), *aff'd as modified,* 175 U.S. 211, 44 L.Ed. 136 (1899). R. Bork, *The Rule of Reason, supra* at 799-800. Most often discussed in the area of covenants not to compete, the doctrine teaches that some agreements which restrain competition may be valid if they are "subordinate and collateral to another legitimate transaction and necessary to make that transaction effective." *Id.* at 797-798; *see Addyston Pipe,* 85 F. at 281-82; *Lektro-Vend,* 660 F.2d at 265.

Generally, the effect of a finding of ancillarity is to "remove the *per se* label from restraints otherwise falling within that category." R. Bork, *Ancillary Restraints and the Sherman Act,* 15 Antitrust L.J. 211, 212 (1959). We assume, with no reason to doubt, that the agreement creating the NFL is valid and the territorial divisions therein are ancillary to its main purpose of producing NFL football. The ancillary restraint must then be tested under the rule of reason, *id.,* the relevance of ancillarity being it "increases the probability that the restraint will be found reasonable." *Aydin Corp. v. Loral Corp.,* 718 F.2d 897, 901 (9th Cir. 1983). As we have already noted, the rule of reason inquiry requires us to consider the harms and benefits to competition caused by the restraint and whether the putative benefits can be achieved by less restrictive means.

The competitive harms of Rule 4.3 are plain. Exclusive territories insulate each team from competition within the NFL market, in essence allowing them to set monopoly prices to the detriment of the consuming public. The rule also effectively foreclosed free competition among stadia such as the Los Angeles Coliseum that wish to secure NFL tenants. *See Smith v. Pro Football, Inc.*, 593 F.2d at 1185. The harm from Rule 4.3 is especially acute in this case because it prevents a move by a team into another existing team's market. If the transfer is upheld, direct competition between the Rams and Raiders would presumably ensue to the benefit of all who consume the NFL product in the Los Angeles area.

The NFL argues, however, that territorial allocations are *inherent* in an agreement among joint venturers to produce a product. This inherent nature, the NFL asserts, flows from the need to protect each joint venturer in the "legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." *Addyston Pipe & Steel*, 85 F. at 292. We agree that the nature of NFL football requires some territorial restrictions in order both to encourage participation in the venture and to secure each venturer the legitimate fruits of that participation.

Rule 4.3 aids the League, the NFL claims, in determining its overall geographical scope, regional balance and coverage of major and minor markets. Exclusive territories aid new franchises in achieving financial stability, which protects the large initial investment an owner must make to start up a football team. Stability arguably helps ensure no one team has an undue advantage on the field. Territories foster fan loyalty which in turn promotes traditional rivalries between teams, each contributing to attendance at games and television viewing.

Joint marketing decisions are surely legitimate because of the importance of television. Title 15, U.S.C. § 1291 grants the NFL an exemption from antitrust liability, if any, that might arise out of its collective negotiation of television rights with the networks. To effectuate this right, the League must be allowed to have some control over the placement of teams to ensure NFL football is popular in a diverse group of markets.

Last, there is some legitimacy to the NFL's argument that it has an interest in preventing transfers from areas before local governments, which have made a substantial investment in stadia and other facilities, can recover their expenditures. In such a situation, local confidence in the NFL is eroded, possibly resulting in a decline in interest. All these factors considered, we nevertheless are not persuaded the jury should have concluded that Rule 4.3 is a reasonable restraint of trade. The same goals can be achieved in a variety of ways which are less harmful to competition.

As noted by Justice Rehnquist, a factor in determining the reasonableness of an ancillary restraint is the "possibility of less restrictive alternatives" which could serve the same purpose. *See* Justice Rehnquist's dissent from the denial of certiorari in *North American Soccer League*, ____ U.S. ____, 74 L.Ed.2d 639, 641 (1982); *Lektro-Vend*, 660 F.2d at 265. This is a pertinent factor in all rule of reason cases. *See Betaseed, Inc. v. U & I Inc.*, 681 F.2d 1203, 1228-30 (9th Cir. 1982); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 303 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093, 62 L.Ed.2d 783 (1980). Here, the district court correctly instructed the jury to take into account the existence of less restrictive alternatives when determining the reasonableness of Rule 4.3's territorial restraint. 32 T.R.2d at 7218; *see Betaseed, Inc.*, 681 F.2d 1203 at 1228; *Berkey Photo*, 603 F.2d at 303. Because there was substantial evidence going to the existence of such alternatives, we find that the jury could have reasonably concluded that the NFL should have designed its "ancillary restraint" in a manner that served its needs but did not so foreclose competition.

The NFL argues that the requirement of Rule 4.3 that three-quarters of the owners approve a franchise move is reasonable because it deters unwise team transfers. While the rule does indeed protect an owner's investment in a football franchise, no standards or durational limits are incorporated into the voting requirement to make sure that concern is satisfied. Nor are factors such as fan loyalty and team rivalries necessarily considered.

The NFL claims that its marketing and other objectives are indirectly accounted for in the voting process because the team

owners vote to maximize their profits. Since the owners are guided by the desire to increase profits, they will necessarily make reasonable decisions, the NFL asserts, on such issues of whether the new location can support two teams, whether marketing needs will be adversely affected, etc. Under the present Rule 4.3, however, an owner need muster only seven friendly votes to prevent three-quarters approval for the sole reason of preventing another team from entering its market, regardless of whether the market could sustain two franchises. A basic premise of the Sherman Act is that regulation of private profit is best left to the marketplace rather than private agreement. *See United States v. Trenton Potteries,* 273 U.S. 392, 71 L.Ed. 700 (1927). The present case is in fact a good example of how the market itself will deter unwise moves, since a team will not lightly give up an established base of support to confront another team in its home market.

The NFL's professed interest in ensuring that cities and other local governments secure a return on their investment in stadia is undercut in two ways. First, the local governments ought to be able to protect their investment through the leases they negotiate with the teams for the use of their stadia. Second, the NFL's interest on this point may not be as important as it would have us believe because the league has in the past allowed teams to threaten a transfer to another location in order to give the team leverage in lease negotiations.

Finally, the NFL made no showing that the transfer of the Raiders to Los Angeles would have any harmful effect on the League. Los Angeles is a market large enough for the successful operation of two teams, there would be no scheduling difficulties, facilities at the L.A. Coliseum are more than adequate, and no loss of future television revenue was foreseen. Also, the NFL offered no evidence that its interest in maintaining regional balance would be adversely affected by a move of a northern California team to southern California.

It is true, as the NFL claims, that the antitrust laws are primarily concerned with the promotion of *interbrand* competition. *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 51, 53 L.Ed.2d 568, 581, n.19 (1977). To the extent the NFL is a

product which competes with other forms of entertainment, including other sports, its rules governing territorial division can be said to promote interbrand competition. Under this analysis, the territorial allocations must directly suppress intrabrand, that is, NFL team versus NFL team, competition. A more direct impact on intrabrand competition does not mean, however, the restraint is reasonable. The finder of fact must still balance the gain to interbrand competition against the loss of intrabrand competition. *See id.*, at 51-56. Here, the jury could have found that the rules restricting team movement do not sufficiently promote interbrand competition to justify the negative impact on intrabrand competition.

To withstand antitrust scrutiny, restrictions on team movement should be more closely tailored to serve the needs inherent in producing the NFL "product" and competing with other forms of entertainment. An express recognition and consideration of those objective factors espoused by the NFL as important, such as population, economic projections, facilities, regional balance, etc., would be well advised. *See* L. Kurlantzick, *Thoughts on Professional Sports and the Antitrust Laws*, 15 Conn. L.R. 183, 206 (1983). Fan loyalty and location continuity could also be considered. *Id.* at 206-207. Al Davis in fact testified that in 1978 he proposed that the League adopt a set of objective guidelines to govern team relocation rather than continuing to utilize a subjective voting procedure.

Some sort of procedural mechanism to ensure consideration of all the above factors may also be necessary, including an opportunity for the team proposing the move to present its case. *Id.; see Silver v. New York Stock Exchange* 373 U.S. 341, 10 L.Ed.2d 389 (1963) (without procedural safeguards, the collective act of the Exchange in disconnecting the wire service to a broker constituted a boycott, per se illegal under § 1); *cf. Deesen v. Professional Golfers Ass'n*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846, 17 L.Ed.2d 76 (1966) (where PGA had reasonable rules governing eligibility of players for tournaments, there was not a § 1 violation). In the present case, for example, testimony indicated that some owners, as well as Commissioner Rozelle, dislike Al Davis and consider him a maverick. Their vote against the

Raiders' move could have been motivated by animosity rather than business judgment.

Substantial evidence existed for the jury to find the restraint imposed by Rule 4.3 was not reasonably necessary to the production and sale of the NFL product. Therefore, the NFL is not entitled to judgment notwithstanding the verdict.

III. JURY INSTRUCTIONS

The NFL also claims it is entitled to a new trial because of error in the jury instructions. In particular, the NFL argues that the instructions lacked the specificity required in a complex lawsuit such as this, that certain of its legal theories should have been presented to the jury, and that the instructions failed to articulate all the requirements of the law for finding an unlawful restraint of trade. The L.A. Coliseum and the Raiders respond by stating that the instructions as given were entirely adequate and the NFL simply attempted to have the jury charged with a partisan and erroneous view of the law.

As required by Fed. R. Civ. P. 51, the NFL submitted proposed instructions and made timely objections when certain of its proposals were rejected. The question, then, is whether, viewing the jury instructions as a whole, the trial judge gave adequate instructions on each element of the case to insure that the jury fully understood the issues. *Ragsdell v. Southern Pacific Transportation Co.*, 688 F.2d 1281, 1282 (9th Cir. 1982); *Van Cleef v. Aeroflex Corp.*, 657 F.2d 1094, 1099 (9th Cir. 1981). A court is not required to use the exact words proposed by a party, incorporate every proposition of law suggested by counsel or amplify an instruction if the instructions as given allowed the jury to determine intelligently the issues presented. *Id; Investment Service Co. v. Allied Equities Corp.*, 519 F.2d 508, 511 (9th Cir. 1975). Well-tailored and specific instructions may be necessary, however, in complex antitrust cases "where . . . abstract legal principles are not self-explanatory to a lay jury, and the facts to which they must be applied are complex." *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 466 n.13 (9th Cir.), *cert. denied*, 377 U.S. 993, 12 L.Ed.2d 1046 (1964). Also, a party is entitled to have theories supported by the evidence presented to the jury. *Reno-West Coast*

Distribution Co., Inc. v. Mead Corp., 613 F.2d 722, 725-726 (9th Cir.), *cert. denied*, 444 U.S. 927, 62 L.Ed.2d 183 (1979). The theory, of course, must have legal as well as factual support; if what is proposed is incorrect the court is not required to recast it in order to ensure the party's exact theory is before the jury, so long as the instructions describe the applicable law. *See id.*

The NFL first contends the instructions failed to emphasize the unique nature of the business of producing NFL football, a business, it argues, most aptly characterized as a joint venture. The trial court's rule of reason instruction, however, told the jury it should consider the "nature of" and "facts peculiar to" the industry and that "one factor you may consider is the degree of mutual cooperation inherent among the member clubs of a professional sports league and the extent to which professional sports leagues differ from ordinary kinds of businesses." 31 T.R.2d at 7216-7218. While not framed in the terms and detail requested by the NFL, this instruction did apprise the jury of the unique nature of NFL football. The trial court was not obliged to specifically instruct the jury on the NFL's theory that the restraint involved here is ancillary to a valid joint venture agreement. The Supreme Court has recognized that the "Rule of Reason . . . has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction." *National Society of Professional Engineers v. United States,* 435 U.S. 679, 689, 55 L.Ed.2d 637, 648 (1978). The NFL's theory is subsumed within the rule of reason. As the district court emphasized, the NFL had every opportunity to present its view of the legality of Rule 4.3 to the jury. 32 T.R.2d at 7195, 7223. The NFL did just that in its closing argument. E.g., 33 T.R.2d at 7491-7495.

The NFL next argues the district court improperly rejected its instruction on causation. It is true the court did not instruct the jury on this element of proving when an injured party is entitled to treble damages under § 4 of the Clayton Act. *See Brunswick v. Pueblo Bowl-O-Mat,* 429 U.S. 477, 489, 50 L.Ed.2d 701, 712 (1977); *see also Kapp v. National Football League,* 586 F.2d 644, 648 (9th Cir. 1978), *cert. denied,* 441 U.S. 907, 60 L.Ed.2d 375 (1979). In this bifurcated trial, however, the jury and the court

were not faced with the question of the propriety of an award of damages, but with the question whether Rule 4.3 violated the antitrust laws and therefore could not be used to preclude the Raiders' move south. *Pueblo Bowl-O-Mat*, 429 U.S. at 491, 50 L.Ed.2d at 713. Whether the jury received proper instructions in this area is best left for the appeal of the damage portion of the trial.

The NFL also argues it was unduly prejudiced by the instructions because they focused on issues of competition among the NFL teams (intrabrand competition) rather than competition between the NFL "product" and other forms of entertainment (interbrand competition). As the NFL asserts, it is the suppression of interbrand competition that primarily concerns the antitrust laws. The trial court instructed the jury on the NFL's relevant market claim that it competes with all forms of entertainment. 32 T.R.2d at 7212-7215. In light of this instruction, the jury was not constrained to ascertain the reasonableness of Rule 4.3 solely in view of the internal NFL market.

There also was no error in the failure of the district court to charge the jury that it could balance the loss of competition in the San Francisco Bay Area against that to be gained in the Los Angeles area. The extent of the loss and gain to competition in these locations was a fact question that could be argued to the jury.

The NFL next argues that the trial court should have charged the jury that it could consider the procompetitive significance of public service and similar benefits, if any, that inure to Rule 4.3. We again find no error. As stated in *National Society of Professional Engineers:*

> the purpose of [either per se or rule of reason] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of the industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

435 U.S. at 692, 55 L.Ed.2d at 650. The judge instructed the jury that it should consider only procompetitive benefits of Rule 4.3.

32 T.R.2d at 7216. The NFL was permitted to argue that Rule 4.3 has procompetitive effects related to serving the public. No more is necessary.

The NFL's other assignments of error in the instructions are without merit. In sum, we are not persuaded that any lack of specificity misled the jury.

IV. VENUE

Oakland Coliseum, intervenor joined by the NFL, argues that the trial court abused its discretion by denying a change of venue motion made pursuant to 28 U.S.C. § 1404(a). In relevant portion, § 1404(a) allows a district court to change venue "in the interest of justice." Oakland Coliseum claims justice would have best been served by moving the case because it was impossible to secure an impartial jury in the Central District of California due to pretrial publicity and the economic interest of the prospective jurors in the outcome of the lawsuit. Prior to voir dire, the district court made a thoughtful and thorough analysis of Oakland's contentions in its memorandum and order denying the change of venue motion. 89 F.R.D. 497 (1981).

We will find an abuse of discretion warranting reversal only if Oakland Coliseum shows "that the setting of the trial was inherently prejudicial or that the jury selection process permits an inference of actual prejudice." *Murphy v. Florida,* 421 U.S. 794, 803, 44 L.Ed.2d 589, 597 (1975); *see Smith v. Phillips,* 455 U.S. 209, 215-217, 71 L.Ed.2d 78, 85-86 (1982); *Chandler v. Florida,* 449 U.S. 560, 581-582, 66 L.Ed.2d 740, 756 (1981); *United States v. Bailleaux,* 685 F.2d 1105, 1109 (9th Cir. 1982); *United States v. Brown;* 540 F.2d 364, 379 (8th Cir. 1976). Neither the pretrial publicity not the alleged financial interest of the jurors compels such a finding.

We assume, with some basis, that the Raiders' proposed move and this lawsuit generated a large amount of publicity in the Los Angeles area. That in itself, however, is insufficient to compel a finding that the defendants were denied an impartial jury. *Dobbert v. Florida,* 432 U.S. 282, 302-303, 53 L.Ed.2d 344, 361-362 (1977); *Murphy v. Florida,* 421 U.S. at 800-802, 44 L.Ed.2d at 595-596. Only in those situations which are "utterly corrupted by

press coverage" will we indulge in a presumption of actual prejudice on the part of any or all of the jurors. *Murphy*, 421 U.S. at 798, 44 L.Ed.2d at 594. No such showing has been made out here. The trial court used a very thorough voire dire process to ensure the jury panel members were not influenced by the publicity prior to trial, including adminstering a 48-page questionnaire prepared by the NFL to all prospective jurors, giving each side ten peremptory challenges instead of the normal three, and dismissing jurors for cause if even the slightest doubt of prejudice was raised. During the trial, the court admonished the jurors each day to refrain from exposure to any type of media coverage of the trial. In fact, one juror was excused because he admitted reading an unscreened newspaper, even though he adamantly denied reading anything but the Ann Landers column, the comics and the "Family Weekly" section. 23 T.R. 2d at 4705-4706, 4920. In view of the trial court's thorough cautionary actions, we cannot say either that he abused his discretion in denying a change of venue or that defendants received an unfair trial because of the publicity.

Failing to show anything beyond the slightest speculation that publicity infected the fairness of the trial, Oakland Coliseum turns to the argument that the jurors had a financial interest in the outcome of the lawsuit which biased their decision. This contention is premised on the economic interest through lower taxes and business generation that residents of the Central District of California purportedly would have in the Raiders' presence in the L.A. Coliseum. The argument also seeks support in Supreme Court precedent such as *Withrow v. Larkin*, 421 U.S. 35, 43 L.Ed.2d 712 (1975), and *Tumey v. Ohio*, 273 U.S. 510, 71 L.Ed. 749 (1927), which stand for the proposition "that the probability of actual bias on the part of the judge or decisionmaker is too high . . . [when] the adjudicator has pecuniary interest in the outcome." *Withrow*, 421 U.S. at 47, 43 L.Ed.2d at 723. Those cases do not mean, however, that an immeasurable and seemingly insignificant economic benefit to a taxpayer suffices to disqualify her or him as a juror. *Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 389 F.Supp. 568, 571 (E.D. Va. 1975); *cf. United States v. Brown*, 540 F.2d 364, 379 (8th Cir. 1976) (there was no basis to strike jurors for cause merely on

showing they resided in St. Louis and indictment alleged a scheme to defraud the city and its citizens).

Here, in fact, four of the eight jurors resided outside Los Angeles County. All the jurors were questioned during voir dire on their potential for any financially motivated bias and the judge was satisfied with the jurors' responses to his questions. Apparently recognizing the defects in its arguments, Oakland also alleges that the questioning and arguments of plaintiffs' counsel at trial were sufficient to convince the jurors to lay aside their sworn duties and decide the case on the basis of "hometown" interests. We decline to engage in such speculation about the mental processes of the individual jurors.

The other arguments made by Oakland on this issue, such as the one claiming it was denied a representative jury because the jury had no football fans, lack merit. Parties are not entitled to jurors of a particular bent or persuasion. They are entitled only to jurors as fair and impartial as all human circumstances and an evenhanded selection process permits. Nor do we believe the "cumulative" effect of the publicity, economic interests and the like show a sufficient likelihood of actual bias. Without more, we are compelled to affirm the denial of the change of venue motion and conclude that the defendants received a fair trial by an impartial jury.

V. CONCLUSION

The NFL is a unique business organization to which it is difficult to apply antitrust rules which were developed in the context of arrangements between actual competitors. This does not mean that the trial court and jury were incapable of meeting the task, however. The lower court correctly applied and described the law. The reasonableness of a restraint is a "paradigm fact question," *Betaseed, Inc. v. U and I Inc.*, 681 F.2d 1203, 1228 (9th Cir. 1982), and our review of the record convinces us the jury had adequate evidence to answer that question.

We believe antitrust principles are sufficiently flexible to account for the NFL's structure. To the extent the NFL finds the law inadequate, it must look to Congress for relief.

The judgment finding the NFL liable to the Los Angeles Coliseum and the Raiders, and enjoining the NFL from preventing the Raiders from relocating in Los Angeles is AFFIRMED.

[Filed Feb. 28, 1984]

Spencer Williams, U.S.D.C. for the Northern District of California, sitting by designation; concurring in part, dissenting in part.

INTRODUCTION

I respectfully dissent from the majority's opinion, insofar as it affirms the district judge's directed verdict that the N.F.L. was not a single entity as a matter of law.

The dispositive issue before this Court is whether the N.F.L.'s invocation of Rule 4.3 to block the Raiders' move to Los Angeles violates the letter and spirit of § 1 of the Sherman Act, 15 U.S.C. § 1. I conclude that the N.F.L. is, as a matter of law, a single entity insofar as this aspect of its operations is concerned, and not subject to the strictures of Sherman Act § 1.

These appeals arise from the controversial relocation of the Raiders National Football League franchise ("Raiders") from Oakland, California to Los Angeles, California. Although many subsidiary procedural issues are posed on appeal, the case stands or falls on whether the trial judge properly concluded that the N.F.L. was not a "single entity", thereby exposing it to liability for Rule 4.3 under the Sherman Act, § 1.

FACTS:

Our consideration of the issue whether or not Rule 4.3 of Article IV of the N.F.L. Constitution violates federal antitrust laws must turn on the relationship of Rule 4.3 to the structure of the league. For this reason, it is appropriate to briefly examine the history and nature of the N.F.L. as a business association, before addressing the issues raised on this appeal.

A. The Relevant History of the N.F.L.

The N.F.L. was established early in this century as an unincorporated business association, the members of which were member franchise clubs dispersed throughout the United States. All but one of its members are privately owned and operated, and although members of the N.F.L. compete on the playing field,

they act jointly in many aspects of their enterprise, as the term "league" implies.

The N.F.L.'s Constitution and By-Laws wield almost plenary control over member club's activities; the N.F.L. acts as the legislative entity which sets rules for, and schedules contests between member clubs, and regulates many other aspects of the operation of the professional football industry, (*e.g.*, an annual draft of eligible college athletes), including the territorial restriction on franchise relocation found in Rule 4.3.

Of particular importance to our analysis is the fact that the N.F.L. Constitution provides for coordination of business activities and revenue sharing to an overwhelming degree. For example, the money derived from lucrative national broadcasting contracts is shared among league members according to agreed upon formulae, and this revenue makes up a large part of the revenue of each team. As to gate receipts for regularly scheduled contests between member clubs, there is a prearranged equation splitting gate admissions between the "home" and "visiting" clubs. Thus, each team relies, to a significant degree, on revenue jointly generated.[1] It is not surprising that, concomitant with this virtual "partnership" arrangement, of which the above-mentioned revenue sharing is most significant, other operating decisions which would normally be made by the owners of a single franchise are subordinated to specified consent of the other clubs. For example, establishment of a new franchise is submitted for approval to all N.F.L. owners before any expansion is permitted. Agreements among owners regarding who shall have the right to employ certain athletes occur every year at an annual "draft" of available players.

At issue here is one aspect of the relationship among the member clubs of the N.F.L. as to when a member franchise club may be relocated to a city other than its original home. It is quite relevant to disposition of this instant suit that those challenging

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[1] Indeed, no team could generate any revenue without drawing down upon the goodwill and reputation of the N.F.L. in the largest sense, or upon the status of any one scheduled opponent in an immediate sense, so that, in effect, all team revenue is jointly produced.

the legality of Rule 4.3 are the Raiders, presently a member club, and the L.A. Coliseum, a stadium seeking an N.F.L. tenant.

B. The History of the Present Action.

I agree in large part with the majority's review of the facts leading up to the two trials below. However, I would emphasize the troubling effect that the stipulation on the presentation of evidence in the second trial had upon the sufficiency of the evidence on relevant markets that was actually placed before the jury.[2]

C. The Various Appeals Pending before this Court.

In addition to the appeal to which the majority and I turn our primary attention, several other motions are pending before this Court. It is these items, and the questions that these cross-appeals raise, that I now address.

Once in this Court, the parties have continued to file multiple, and somewhat coflicting, appeals. The motions that have not been resolved by the majority are largely different procedural means to accomplish the same ends; I discuss the more significant below.

First, the N.F.L. has moved this Court for permission to supplement the record on the question of the effect of the stipulation entered into by the parties concerning the evidence introduced at the second trial on the relevant market. I find the majority's treatment of this matter interesting, inasmuch as it suggests that the issue of relevant market is no longer one for the jury; we admit to similar surprise that the very evidence that the parties thought at a minimum should have been placed before the jury was, in fact, never so placed in the second trial. Regardless of how the majority wishes to restate the manner in which relevant market is to be proven in this Circuit, its approach is to recharacterize the case as was tried, and suggest by inference that the plaintiff may discharge its burden of establishing the relevant product and geographic markets by a theoretical argument to the court, rather than by presenting evidence to a jury; this lynchpin

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[2] See Majority Opinion at 21-28, and my discussion *infra* of the inconsistency left unanswered by the majority's treatment.

of its "rule of reasonableness" cannot pass as innocuously by long-standing precedent as the majority would have it. Since I feel that it was error to submit Rule 4.3 to the jury in this context, I would not so strain the case as was tried the second time around to conform it to some new, and as yet undefined, rule of law.

Second, the Raiders cross-appeal from the district judge's rulings: (1) determining, on summary judgment, that N.F.L. Rule 4.3 was effectively amended on October 5, 1978; (2) that, as a matter of law, no contract was created between the Raiders and the N.F.L., on October 5, 1978; and, (3) that a directed verdict on behalf of Rozelle, Frontiere and Klien was appropriate, would presumably be withdrawn, under the majority's disposition; I would affirm the trial court's handling of all three matters.

Finally, as for the N.F.L.'s motion for remand of the injunctive judgment entered on June 14, 1982, with instructions to the court for a new trial, I find the matters raised by the motion in the alternative to the N.F.L.'s notice of appeal, especially the allegations surrounding the plaintiffs' suppression of a key document, the "Hardy notes," distressing. I note that the majority's opinion does not deal with this issue.

DISCUSSION:

The district court found there were no disputed issues of material fact on the question of whether the N.F.L. was a single entity under the Sherman Act § 1, insofar as its enforcement of Rule 4.3 was concerned, and directed a verdict for appellees concluding that it was not. Upon this finding, Rule 4.3 was submitted to the jury's scrutiny under the Rule of Reason analysis of the Sherman Act, § 1.

Under established Ninth Circuit law, resolution of whether the N.F.L. had capacity to violate Section 1 of the Sherman Act by conspiring *inter se* must be committed to the jury, if there exists "sufficient evidence in the record to permit a jury to find" that the N.F.L. was not a single entity, but "not . . . sufficient (evidence) to preclude the jury from finding otherwise." *Murray v. Toyota Motor Distributors, Inc.*, 664 F.2d 1377, 1379 (9th Cir. 1982) (*per curiam*).

In *Murray v. Toyota Motor Distributors, Inc., supra*, the Ninth Circuit held that the "single entity" question must not be taken from the jury where the evidence would *permit* a finding that the defendants are part of a single economic unit. As the majority in this case states: "(i)t would be reversible error, then, to take the issue from the jury if reasonable minds could differ as to its resolution". *Id.* I read the majority's opinion to find such an opportunity for "reasonable minds" to differ, even if the evidence that whether "the N.F.L. has attributes of a partnership or joint venture (w)as *not* "compelling", since it should have been submitted to the jury once there was simply "persuasive" evidence on either side. *C.f., Majority Opinion* at 10.

I agree however with the district court that there were no material issues of disputed fact as to whether the N.F.L. was a single entity, and that the matter was ripe for disposition as a matter of law by the court. I also apply the settled rule of appellate review, that such decisions by the trial court are subject to *de novo* review by this Court. *C.f., General Business Systems v. North American Phillips Corp.*, 699 F.2d 965, 980-81 (9th Cir. 1983). But, the majority and I differ substantially in the conclusions to be drawn from such undisputed evidence.

The only realistic manner in which to define what constitutes a single entity for antitrust review is to focus upon the purpose the definition is to serve. "Single entity" taken in a functional sense begins and ends with an analysis of formal organizational and operational aspects of an enterprise, reconciled with the realities of the economic competition in the marketplace. If the aim of the Sherman Act § 1 is consumer-dictated supply, unfettered by conspiracy between competing producers,—and, I submit that it is—extreme caution is warranted in defining precisely what competitive units exist in the marketplace. It is equally as important to permit collaboration and concerted action among branches of a single economic entity in the marketplace with impunity from the Sherman Act § 1, as it is to police conspiracies between economic competitive entities. Nonetheless, all economic units remain susceptible to challenge under the antitrust laws from those external entities injured by acts violative of § 1, or competitive

entities injured as result of monopoly, or attempted monopoly, in an industry under Sherman Act § 2 tenets.

Resolving whether the N.F.L. is a single entity requires consideration of many factors, including formalistic aspects of operations such as ownership, overlapping directorates, joint marketing or manufacturing, legal identity, corporate law autonomy, and substantive aspects such as *de facto* autonomy of member clubs, chains of command over policy decisions, public perception and economic interdependency rendering otherwise independent member clubs subordinate to the intergrated whole. When the entities in question are to be evaluated under the antitrust laws, the crucial criterion is whether the formally distinct member clubs compete in any economically meaningful sense in the marketplace. See *General Business Systems, supra* at 980-81.

The majority's attempt to reconcile its decision with that of *General Business Systems, supra,* is misleading and inaccurate. The text of the majority's opinion implies that corporate policies *must* be unitary for a business organization to be found a single entity. In *General Business Systems, supra* at 980-81, the Circuit concluded that in any case in which the relationship between the two or more formal entities did "not fall clearly at either of these extremes"; *i.e.*, "where corporate policies are set by one individual or a parent corporation" or where "jointly owned corporations that compete in the marketplace, hold themselves out to the public as competing organizations, and set policy independently . . . " (*id.* at 980), the case must be sent to the jury. This admonition was disregarded in this case—a paradigm case testing the functional "single entity" concept.

The district court placed an unwarranted emphasis upon the formalistic aspects of the relationship of the N.F.L. and the member clubs, ignoring the subtle, but yet more significant interdependency of the member clubs and the indivisibility of the clubs with the N.F.L. 519 F. Supp. 581, 582-83. For example, the district court makes much of two such formal organizational characteristics: separate incorporation and management. *Id.* But, when viewed from the mundane perspective of daily operations, emphasis upon these legal formalisms obscures the reality of life in the N.F.L. Only the athletic strategems are autono-

mous—albeit tightly constrained by league guidelines on eligibility, medical and physical condition and exploitation of player talent. The N.F.L. cannot truly be separated from its member clubs, which are simultaneously franchisees and franchisors. The Raiders did not, and do not now, seek to compete with the other clubs in any sense other than in their win/loss standings; they do not challenge the plethora of other ancillary regulations attendant to the league structure, including the draft, regulation and scheduling of meetings between teams, and the system of pooled and shared revenues among the clubs because they wish to remain within its beneficial ambit.

As the majority opinion correctly points out:

> this lawsuit requires us to engage in the difficult task of analyzing the negative and positive effects of a business practice in an industry which does not readily fit into the antitrust context. Section 1 of the Sherman Act was designed to prevent agreements among competitors which eliminate or reduce competition and thereby harm consumers. Yet, . . . , the N.F.L. teams *are not true competitors, nor can they be.*

Majority opinion, at 19, *emphasis added.* Yet, the majority's analysis falters in a similar manner. It is the commonality of, or necessary cooperation in, the means of production, not the formal structure of the ownership of the N.F.L. infrastructure which should be determinative of the classification of this enterprise.

The profound interdependency of the N.F.L. and member clubs in the daily operation and strategic marketing of professional football belies the district court's conclusion that each member club is an individual and economically meaningful competitor. The dispositive factor in determining whether the member clubs are capable of conspiring to restrain competition—the *sine qua non* of the Sherman Act § 1—by reason of Rule 4.3, is the extent, if any, of their competition in an economic sense. Virtually every court to consider this question has concluded that N.F.L. member clubs do *not* compete with each other in the economic sense. See *North American Soccer League v. N.F.L.*, 670 F.2d 1249, 1251 (2d Cir. 1982); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1179 (D.C. Cir. 1978); *Mackey v. N.F.L.*, 543 F.2d 606,

619 (8th Cir. 1976); *Mid-South Grizzlies v. N.F.L.*, 550 F. Supp. 558, 562 (E.D. Pa. 1953).

As the district court in *Mid-South Grizzlies* acknowledged, although

> (a)ll but one team are privately owned and operated . . . and 'compete' with one another on the playing field and for the top players, they act jointly in many aspects of their enterprise as the term league necessarily implies.

Mid-South Grizzlies, supra at 562. In adopting this view to reject a potential entrant's challenge to his exclusion from N.F.L. participation, the court in *Mid-South Grizzlies* recognized that the creation of many joint products, only the most tangible of which is the professional football season, as byproducts of the intangible "goodwill" are directly attributable to the present league/member club structure. *Id.* at 568. I agree with the other courts which, when presented with similar questions arising in professional hockey and basketball, realized that it is nonsensical to emphasis intrinsic worth of a franchise in a vacuum, when the value of the franchises are part and parcel of the quality and conformity insured by league regulation of the placement, ownership, and coordination of all on and off the field interaction of member clubs. See *San Francisco Seals, Ltd. v. National Hockey League*, 379 F. Supp. 966, 969-971 (C.D.Cal. 1974) (the N.H.L., although subject to full scope of the antitrust laws, is "one single business enterprise, competing against other similarly organized professional leagues"); *Levin v. National Basketball Association*, 385 F. Supp. 149, 150, 152 (S.D.N.Y. 1974) ("While it is true that the antitrust laws apply to a professional athletic league, and that joint action by members of a league can have antitrust implications this is not such a case.").

The majority's holding places the Ninth Circuit's ruling in conflict with every other circuit to consider this issue. As the majority points out, but misapplies, the Second Circuit found the N.F.L. to be a "unincorporated joint venture". *N.A.S.L. v. N.F.L., supra* at 1257, (2d Cir.), *cert. denied*, ____ U.S. ____ (1982). The Fifth Circuit, in an obscure but quite scholarly opinion, analyzed the North American Soccer League to be like the

N.F.L.; *i.e.*, a "joint employer" for labor relations purposes, upon an examination of its "N.F.L.-like" characteristics. *N.A.S.L. v. N.L.R.B.*, 613 F.2d 1379, 1382 (5th Cir. 1980). The Third Circuit, after reviewing the substantial history of "single entity" litigation in the professional sports leagues, endorsed the D.C. Circuit's conclusion that the N.F.L. was a "single entity" for purposes of Sherman Act § 1, and thus not subject to "invocation of a *per se* rule" against "group boycotts", because: (1) "the N.F.L. clubs that had combined were *not* competitors in any *economic* sense" and "no team was 'interested in driving another team out of business'; and, (2) the N.F.L. clubs had not combined '*to exclude competitors or potential competitors* from their level of the market.' *Larry V. Muko, Inc. v. Southwestern PA., etc.*, 670 F.2d 421, 429, n.11 (3d Cir. 1982), citing *Smith v. Pro Football, Inc.*, 593 F.2d. 1173, 1178 (D.C. Cir. 1978). (*emphasis in original*). (Other citations omitted).

What these courts have all recognized, and what ultimately persuades me, is that functionally distinct units that cannot produce separate, individual goods or services absent coordination are inextricably bound in an economic sense, and must adopt certain intra-league instrumentalities to regulate the whole's "downstream output". In the case of the member clubs, this "downstream output" is professional football, and the organ of regulation is the unincorporated, not-for-profit, association commonly known as the N.F.L. There is virtually no practical distinction between the League, administered by the appointed Commissioner, *per se* and the member clubs; the N.F.L. represents to all clubs, including the Raiders, the least-costly and most efficient manner of reaching day-to-day decisions regarding the production of their main, and collectively produced product.

Although the N.F.L. determines matters of scheduling, resolving player disciplinary matters and inter-club disputes, supervising officials and public relations, as well as other routine matters, critical league decisions, such as the matter of franchise location, are submitted to an Executive Committee comprised of a representative of each club. There can be no instance of the Executive Committee acting in other than the collective interests of the member clubs, since by definition, that body's decisions are the

consensus of N.F.L. members. There is no distinct interest of the N.F.L., since it exists solely to coordinate the members' participation in the joint production of professional football.

By riveting its attention upon the "single entity" issue, as a sort of talismanic affirmative defense to the appellees' charges here, the district court overlooked the dispositive inquiry of whether Rule 4.3, as an instrument of the N.F.L. member clubs, violated the Sherman Act § 1, by restricting any economically independent entities from supplying goods or services related to professional football to the individual clubs. I use "upstream flow" as shorthand for products and services like players and coaches, television services, potential investors and the myriad of other integrated industries; member clubs do have independent and economically significant identities apart from the collective N.F.L. for the limited purposes of their extra-league dealings with those upstream suppliers. See Weistart & Lowell, *Law of Sports*, § 5.11 (1978), 687, 692 esp. n. 86. Thus, § 1 can and should protect the competitive aspects of player drafts, disallow cross-ownership bans and exclusive television and equipment contracts, by insuring that any one club's interaction outside the confines of intra-league regulation of production of the sport is unfettered by the working of any intra-league rule.

This is the critical distinction between cases which invalidate various intra league rules, and those which uphold them. That member clubs compete for investors and the services of talented players is underscored by the fact that, although aggregate revenues are shared among all member clubs, there is no intra-league regulation upon the form of investment by a member club's financial backers, the dividend policy, or operating expenses and expenditures of any member for player services. League regulations comport with economic reality in this sense; courts have merely applied a similar philosophy to other aspects of the professional leagues' operations, including, *inter alia*, club-player relationships. *See, e.g., Smith, supra* (N.F.L. player draft held to violate § 1, even though N.F.L. teams not "economic" competitors, because it "forces each seller of football services to deal with one, and only one buyer, robbing the seller, as in any monopsonistic market, of any real bargaining power."); *Mackey, supra*, (only

relevant market in which to evaluate "Rozelle Rule" was that "for players' services"); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1061 (C.D. Cal. 1971) (harm resulting from restriction on non-collegiate players' recruiting was these players' exclusion from market in which they sought to compete by reason of the monopoly power exerted by the N.B.A.); *accord, Linseman v. World Hockey Association*, 439 F. Supp. 1315, 1322 (D.Conn. 1977); *Kapp v. National Football League*, 390 F. Supp. 73, 81-82 (N.D. Cal. 1974), *appeal vacated*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) ("(a) conceivable effect of the ("ransom" or "Rozelle" rule) would be to *perpetually* restrain a player from pursuing his occupation among the clubs of a league that holds a virtual monopoly of professional football employment in the United States", which "goes far beyond any possible need for fair protection . . . and imposes upon the player-employers or the purposes of the N.F.L. such undue hardship as to be an unreasonable restraint. . . ."); *c.f., North American Soccer League, et al. v. N.F.L., et al., supra*, (N.F.L. ban on cross-ownership of professional football and soccer league clubs violative of Sherman Act § 1).

The paradox to which I return, as the root of why the N.F.L., as well as other sports leagues, must be regarded as a "single entity" is that the keener the on-field competition becomes, the more successful their off-the-field, and ultimately legally relevant, collaboration. The formal entities, including the member clubs—including the Raiders—which the district court ruled to be competitors cannot compete, because the only product or service which is in their separate interests to produce can only result as a fruit of their joint efforts. This systemic cooperation trickles down to all members of the league, regardless of their on-the-field record, at least to the extent of the shared revenues. As at least one district court has previously recognized, despite some limited independently earned profit from "team paraphernalia" and "local broadcast revenues",

> (a) franchise's popularity is inextricably bound up with the quality of its competition on the playing field and the resulting excitement and sense of team loyalty.

Mid-South Grizzlies, supra, at 568. The ability to accrue separately accounted and disbursed profit, of which the district court made much, "is an indirect benefit of being a member of the league". *Id.*

A ruling that the N.F.L. cannot enforce Rule 4.3 is effectively ruling that it may not enforce any collective decision of its member clubs over the dissent of a club member, although this is precisely what each owner has contractually bargained for in joining the enterprise. Without power to reach collective decisions, the N.F.L. structure becomes superfluous, and professional sports, without a cost-effective policing mechanism such as the league, will dissolve in the face of uncontrollable free-riding and loss of economies of scale. *Broadcast Music, Inc. v. Columbia Broadcast System, Inc.*, 441 U.S. 1 (1979)

Not only did the district court underrate the business scenario in which the member teams cooperate far more than they compete in the legally irrelevant on-field sense, but its directed verdict on the single entity issue ignored two significant aspects of the N.F.L.'s organization. First, the N.F.L. member clubs pool their revenues to a degree unique even among sporting leagues. By focusing upon the separate calculation of profits and loss by members, the district court elevated form over substance. Profit, as currently understood in the accounting profession, is a term of art, and as such is inherently subjective, often manipulated by equity interests to serve legally irrelevant business motives. The relevant consideration, as the N.F.L. has recognized by implementation of its shared revenue concept, is total infusion of consumer dollars into the sport, and some predictable and centrally administered allocation of those jointly earned revenues among member clubs. After that purpose, the members adopt the only workable model for earning and distributing the revenues from sale of a non-severable and indistinct product—professional football. See generally, Quirk, *An Economic Analysis of Team Movements in Professional Sports*, 38 Law & Contemporary Problems 42 (1973).

The product distributed by the member clubs is not analogous to ball bearings (*Timken Roller Bearing Co. v. U.S.*, 341 U.S. 593 (1951)), mattresses (*U.S. v. Sealy, Inc.*, 388 U.S. 350 (1967)),

or groceries (*U.S. v. Topco Associates*, 405 U.S. 596, 598 (1972)), because stripped of the N.F.L. rules, participation in a regulated draft, orderly schedules and league standings, professional football is indistinguishable from sand lot follies. This inescapable fact of interdependence distinguishes the N.F.L. franchisees and professional football from other industries comprised of "separate business entities whose products have independent value" (519 F. Supp. at 584) banded together in *de facto* cartels. *C.f., Broadcast Music Inc., supra; Associated Press et al. v. United States*, 326 U.S. 1, 18 (1945) (Douglas, J., in concurring, notes that it is unclear whether the AP system would violate Sherman Act § 1).

There was no evidence before the district court establishing that a member club of the N.F.L. could, or would seek to, defect to the U.S.F.L., thereby transferring its assets in quest of greater exploitation. Only such a showing, or an alternative theory, supported by evidence in the record could illustrate that any particular member club had an intrinsic value shorn of its affiliation with the N.F.L., and thus could support the district court's result. We find no such evidence in the record. *C.f. Associated Press, supra* (newspapers which sought to affiliate did not share revenues, and each produced separate and distinct products with intrinsic value). There is no evidence that any of the member clubs' investors would have committed time or capital investment without the existing league structure. Without the league, professional football becomes a pursuit no more substantial than a group of finely-tuned athletes traveling haphazardly about, in search of playing competition. *Accord, Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

Not only is it legally irrelevant that a second professional league has sprung up, since the U.S.F.L. did not exist at the time of trial, but since the two leagues' schedules do not overlap, one should not hypothesize as to any competitive relationship between the two, or the effect such inter-league competition would portend for the validity of intra-league regulation. Thus, while I find issues of supposed competitive relations between the N.F.L. and U.S.F.L., or between existing and any new franchisees, intellectu-

ally interesting, I also dismiss any legal conclusions based upon these entities as speculative.

Holding that the N.F.L. is not a single entity, but rather an aggregation of economic competitors, is tantamount to ruling that the N.F.L. structure is itself *per se* invalid under the Sherman Act § 1; this will spell the end of sporting leagues as are currently used in football, hockey, golf, soccer, basketball and countless other associations in industries with similar endemic characteristics. See *Board of Regents of the University of Oklahoma v. N.C.A.A.*, 707 F.2d 1147 (10th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3308, Oct. 10, 1983.

To elevate formal corporate characteristics of ongoing economic entities above the substance of what purpose and function the structure serves, and what product(s) emerge from the process would not only destroy the N.F.L., professional sports leagues, and the goodwill that results from continuity in national allocation of the sport throughout the country, but would create a rule of law casting all franchise/wholesale distribution relationships into inescapable doubt.

Rather than avoid creating an "exemption" from the Sherman Act for professional sporting leagues, failing to account for the substantial and unique characteristics extant in professional sports by refusing the N.F.L. review as a single entity creates turmoil and dissolves the analytic framework which courts scrutinize agreements under Sherman Act § 1. It is unrealistic and inaccurate to lump intra-N.F.L. rules in with agreements binding separate economic entities which produce independent products and accrue independent revenues. See *Mid-South Grizzlies, supra*; *Levin, supra*. Rule 4.3 is no more a restraint on trade in professional football for Sherman Act § 1 purposes, than is an intra-corporate directive regulating the location or operation of its headquarters, franchise, or branch of a multi-outlet business. *See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

No "antitrust exemption" for the N.F.L. would be created by holding that it is a single economic entity for purposes of regulating franchise location. Section 2 of the Sherman Act, prohibiting

monopolies and attempts to monopolize, remains fully applicable to all N.F.L. intra-league rules and activities. See *Mid-South Grizzlies, supra; c.f., Bowman v. N.F.L.*, 402 F. Supp. 754 (D. Minn. 1975) (challenge brought by former W.F.L. players to N.F.L. teams as an illegal boycott and unjustified exercise of monopoly power); *Philadelphia World Hockey Club, Inc. v. Philadelphis Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972) (Sherman Act § 2 applied to bar hockey reserve clause).

Many present N.F.L. practices, including Rule 4.3, are highly suspect under the Sherman Act § 2 prohibitions, because notwithstanding the form or substance of the N.F.L.'s style of organization and operation, some practices appear calculated to create barriers to entry for would-be rival leagues in profitable geographical markets. In short, Sherman Act § 2 is the proper curb upon the N.F.L.'s successful exploitation of its intra-firm economies of scale and competitive advantages. *Radovich v. N.F.L.*, 352 U.S. 445, 453-54 (1957) and particularly *American Football League v. N.F.L.*, 323 F.2d 124, 131 (4th Cir. 1963) suggest the possibility of true economic competitors challenging the effect of intra-league rules upon nascent competition under § 2 of the Sherman Act.

The Raiders do not have standing to challenge Rule 4.3 under § 2; as part and parcel of the entity they knowingly joined in 1967, they may have a cause of action in contract against the rest of the N.F.L. for failure of their expectations arising from their membership, but cannot challenge intra-league regulations, as could would-be "upstream" suppliers or hopeful candidates for franchises like the Mid-South Grizzlies or the San Francisco Seals. See *San Francisco Seals v. National Hockey League*, 379 F.Supp. 966, 971-72 (C.D. Cal. 1974). The Coliseum may be able to mount a successful challenge to Rule 4.3 upon a §2 theory, but that issue is not presently before this Court.

As always, § 1 remains a viable theory under which those "upstream" aspects of member clubs' operations—those activities which the N.F.L. and previous courts acknowledge the individual members as economically distinct entities—could be challenged. An oft-tried, and frequently successful example of this theory has been the player draft litigation; the distinction between instances

in which the N.F.L. acts as a collective monitor of intra-league affairs, and those in which it intercedes at the behest of a member club for anti-competitive advantage over "upstream" bargaining entities outside the N.F.L.

The purposes for which the N.F.L. should be viewed as a single entity, impervious to § 1 attack, must be functionally defined as those instances in which member clubs must coordinate intra-league policy and practice if the joint product is to result. *See, Broadcast Music Inc., supra; GTE Sylvania, supra.* Prohibiting the N.F.L. from attempting to exploit a monopolistic position in the industry, or from cloaking concerted anti-competitive pressure upon extrinsic "upstream" suppliers in the guise of "league" restrictions, does not require that we strike ancillary terms of the franchise agreements between member clubs as anti-competitive. A principled approach requires that we distinguish one situation from the other, and protect both competitive markets for football players and television coverage, as well as the integrity of terms Al Davis agreed to as salient aspects of his arms' length negotiations with the other member clubs. Davis has received no more or less than he has bargained for, as a franchisee of the N.F.L.

To hold the N.F.L. a single entity for purposes of intra-league regulation of relocation of existing franchises, thereby cutting off Sherman Act § 1 liability in this instance, is fully consistent with the prior cases that address the validity of league regulation of member clubs. In such cases, the leagues' power has consistently been upheld. *See, e.g., A.F.L. v. N.F.L., supra; Mid-South Grizzlies, supra; San Francisco Seals, supra*; and *Levin, supra.*

I concur in the majority's opinion, insofar as it affirms the trial judge's denial of the appellants' motion for a change in venue. However, I would note the inappropriateness of applying the substantial body of case law dealing with racial bias in criminal venire to an instance where the strongest objections to the venue revolved around a highly attentuated financial or civic interest bestowed upon the jury by its deliberations concluding in favor of the L.A. Coliseum and Raiders. I would commend the trial judge for his extraordinary care in screening out prospective jurors who showed even a hint of bias, in maintaining an orderly proceeding despite the high degree of press coverage and histrionic advocacy

by the parties, and in assuring deliberations in an informed and unemotive manner. As a result of his painstaking care, I find that the appellants received the verdict of six fair and untainted jurors.

CONCLUSION:

Because the district court incorrectly determined that the N.F.L. member clubs are not engaged in a single enterprise for purposes of determining the location and marketing of professional football games between members, the jury verdict on the lawfulness of Rule 4.3 must not stand. Rule 4.3 cannot, as a matter of law, violate §1 of the Sherman Act. The judgment of the district court should be reversed and judgment entered for the N.F.L. and its co-defendants.

Appendix D

In the United States Court of Appeals
for the Ninth Circuit

Nos. 83-5907, 83-5908, 83-5909
D.C. No. CV 78-3523-HP

Los Angeles Memorial Coliseum
Commission, et al.,
Plaintiff/Appellee,

vs.

National Football League, et al.,
Defendants/Cross-Defendants/Appellants,

vs.

Oakland Raiders, Ltd., now known as
Los Angeles Raiders,
Cross/Claimant/Appellee.

ORDER
[Filed March 12, 1987]

Before: ANDERSON and NELSON, Circuit Judges, and S. WILLIAMS,* District Judge.

We are indebted to counsel for calling to our attention our oversight concerning the still pending National Football League (NFL) petition for rehearing and suggestion for rehearing en banc filed June 30, 1986. We have received no response from any other parties concerning this oversight and we assume none is intended. In order to bring this matter to a conclusion in this court:

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* The Honorable Spencer M. Williams, United States District Judge, Northern District of California, sitting by designation.

IT IS ORDERED that the panel has voted unanimously to deny the NFL petition for rehearing and to reject the en banc suggestion.

The full court has been advised of the suggestion for en banc rehearing, and no judge has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected. The mandate shall issue forthwith.

The Raiders' motion for attorneys' fees on appeal in these and related cases is GRANTED. The assessment of attorneys' fees is REMANDED to the district court with instructions to permit a reasonable time for the NFL to respond to the fee application and for such further proceedings as may be appropriate to the determination.

Any appeal from a final determination shall be referred to this panel.

Appendix E

United States District Court
Central District of California
No. 78-3523-HP

Los Angeles Memorial Coliseum
Commission,
Plaintiff,

vs.

National Football League,
an unincorporated association, et al.,
Defendants.

Oakland Raiders, Ltd.,
Cross-Claimant,

vs.

National Football League,
an unincorporated association, et al.,
Cross-Defendants.

[Filed June 14, 1982]

FINAL DECREE

The liability and fact-of-damage issues have been tried. The jury has returned its verdicts in favor of the plaintiff and cross-claimant. The Court finds that the plaintiff and the cross-claimant are entitled to an injunction pursuant to § 16 of the Clayton Act (15 U.S.C. § 2).

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. By applying Rule 4.3 to prevent the Oakland Raiders from transferring the location of its NFL franchise to the Los Angeles Memorial Coliseum, defendants have agreed to unreasonably restrain and, in furtherance of said agreement, have unreasonably restrained trade and commerce in violation of § 1 of the Sherman Act;

2. The NFL and its member clubs are hereby permanently enjoined from interfering with, preventing or impeding transfer of the Oakland Raiders' NFL franchise from the City of Oakland to the Los Angeles Memorial Coliseum.

3. The officers, agents, servants, employees and attorneys of each defendant, and all persons in active concert or participation with them, or any of them, are permanently enjoined from doing any act that defendants are hereinabove enjoined from doing.

4. The Court hereby determines that there is no just reason for delay in entering this final judgment on plaintiff's and cross-claimant's claim for declaratory and equitable relief, and the Court expressly directs that this final judgment be entered.

5. It is hereby FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff and cross-complaint each shall have and recover its costs of suit, including a reasonable attorneys' fee, the amount thereof to be fixed by the Court hereafter at such time as the Court shall determine.

6. Jurisdiction is retained for the purposes of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, or for the enforcement of compliance thereof, and punishment of violations thereof, and to determine the damages recoverable by plaintiff and cross-claimant against defendants.

Dated: June 14, 1982.

HARRY PREGERSON
United States Circuit Judge
Sitting by Designation

Supreme Court, U.S.
FILED
AUG 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LOS ANGELES RAIDERS, A LIMITED PARTNERSHIP,
Petitioner,

v.

NATIONAL FOOTBALL LEAGUE,
AN UNINCORPORATED ASSOCIATION, *et al.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
FRANK ROTHMAN
300 South Grand Avenue
Los Angeles, California 90071
(213) 687-5000

COVINGTON & BURLING
*DANIEL M. GRIBBON
JOHN H. SCHAFER
PAUL J. TAGLIABUE
LYLE JEFFREY PASH
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

Attorneys for National Football League Respondents

**Counsel of Record*

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PRELIMINARY STATEMENT

Respondents National Football League, *et al.* ("NFL" or "League"), submit this brief in opposition to the petition for a writ of certiorari filed by the Los Angeles Raiders. The petition seeks review of that portion of a decision of the Court of Appeals for the Ninth Circuit that remands an antitrust money judgment in favor of the Raiders with instructions to reduce that judgment to account for the value of the Los Angeles franchise which the Raiders seized from the League. The Raiders' petition identifies no conflict between the remand ordered by the court below and any decision of either this Court or another court of appeals, and presents no issue otherwise appropriate for review by this Court.

There is presently pending before the Court a petition by respondents for a writ of certiorari to review other issues decided by the court below on which guidance from this Court is plainly necessary. *National Football League, et al.*, v. *Oakland Raiders, Ltd. and Los Angeles Memorial Coliseum Commission*, No. 86-1972 (filed June 10, 1987). Review by this Court of those issues may well moot the distinctly subsidiary issue raised by the Raiders in this petition, which in any event was correctly decided by the court below.[1]

COUNTERSTATEMENT OF THE CASE

The background and prior proceedings are fully set forth in the petition in No. 86-1972. We briefly describe the proceedings below that relate to the remand challenged by the Raiders.

The liability phase of this bifurcated trial resulted in a judgment in favor of petitioner and an injunction against the League, which were affirmed by the Court of Appeals. (A-46 to A-95)[2] In affirming, the Court of Appeals stated: "We review only the liability portion of the bifurcated trial; the damage

[1] We concur with the concluding comments of the Raiders' petition concerning the importance of sports-antitrust issues and the significance of professional sports in American life. (Pet. at 20) The public interest in these matters is best served by addressing directly the issues raised in No. 86-1972.

[2] The proceedings were bifurcated at plaintiffs' request and over the NFL's objection.

phase was concluded in May 1983 and is on a separate appeal." (A-47)[3] Although the Court of Appeals expressly acknowledged that "the NFL teams are not true competitors, nor can they be", (A-60) and that "NFL football requires some territorial restrictions . . . to secure each venturer the legitimate fruits of that participation", (A-68) it affirmed a jury finding that the League's disapproval of the Raiders' transfer to Los Angeles violated Section 1 of the Sherman Act. In so holding, the court put principal emphasis on perceived defects in the "procedural mechanism" by which the League administered Rule 4.3 of the League agreement, which governs team transfers. (A-69, A-71)

The trial of petitioner's claim for damages resulted in a money judgment in favor of petitioner of approximately $35 million after trebling. The NFL's appeal from this judgment was heard by the same panel that had affirmed the earlier judgment of liability. The court below held that the opportunity to place an NFL team in Los Angeles belonged to the League as a whole, (A-25, A-26, A-29) and that the Raiders' damages should be offset to reflect their unilateral seizure of that valuable business opportunity. The offset was to equal the amount by which the value to the League of the Los Angeles opportunity seized by the Raiders exceeded the value of the opportunity to place a team in Oakland, which was surrendered by the Raiders when they left Oakland. (A-27 to A-28) The court accordingly vacated the money judgment in favor of the Raiders and remanded to the District Court to determine the amount of the offset and the Raiders' actual damages, if any. (A-34)

Whether by design or inadvertence, the Raiders overlook the unanimity of the Court of Appeals in determining the appropriateness of this offset. The court, without dissent, found that "[t]he district court . . . erred in refusing to admit evidence of the full benefits of the Los Angeles expansion opportunity received by the Raiders, and in refusing to instruct the jury on the NFL's offset defense." (A-29) Judge Nelson dissented only from the court's determination that the offset should be applied to reduce

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[3] Thus, the District Court's decree of June 14, 1982, provided for retaining jurisdiction in order to, *inter alia*, "determine the damages recoverable . . . against defendants." (A-99)

the single damages that the jury had found in favor of the Raiders. (A-41 to A-45) In her view the offset should be applied only to reduce the amount of the judgment after trebling.[4]

The Raiders challenge both the allowance of the offset and its deduction from the single damages found by the jury.

REASONS FOR DENYING THE WRIT

I. No Issue Of Res Judicata Is Presented

The Raiders' primary contention is that the Court of Appeals' correction of the District Court's error in failing to admit evidence and properly instruct the jury in the damage trial "flouts *res judicata* principles." (Pet. at 7) This argument misconceives the decision below and has no support in the principles of *res judicata*.

Far from depriving the Raiders of their earlier judgment, the Court of Appeals' opinion on damages expressly reaffirms the earlier grant of injunctive relief, pursuant to which the Raiders have played in Los Angeles since 1982, and pursuant to which they will continue to play in Los Angeles. (A-26, A-27) For the past five years, the Raiders have enjoyed the considerable financial benefits of a Los Angeles address without paying for that franchise territory and have also continued to receive all the benefits of membership in the NFL. None of that is altered by the opinion below on damages. The court made clear that its focus was not on the injunctive relief that it had previously affirmed, but rather on the windfall received by the Raiders—a windfall that it found should be "taken into account when awarding *additional* damages beyond the injunctive relief." (A-27) (emphasis in original) There has been no "retool[ing of] a judgment" for an injunction as the Raiders claim; (Pet. at 9) instead, the court below merely vacated a judgment that awarded money damages not limited to the actual extent of the injury.

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[4] As to the appropriateness of the offset, Judge Nelson said: "I also agree that the value of the Los Angeles opportunity, improperly conferred upon the Raiders by the district court's injunction, should be returned to the NFL." (A-41)

Without citation of authority, the Raiders claim that "[t]he decision that the NFL could not lawfully keep the Raiders out of the Los Angeles Coliseum did not mean that NFL could charge the Raiders for letting it in." (Pet. at 8) Presumably this is intended to suggest that a finding of antitrust violation in support of an injunction authorizes a damage claimant to appropriate the violator's property. However, as both *Hanover Shoe* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), establish, an antitrust violation does not preclude a violator from obtaining compensation for the use of his property. The Court of Appeals simply applied the teachings of these cases and did nothing to disturb the injunction previously issued in the Raiders' favor.

The Raiders' argument also depends on a mistaken view of *res judicata*. That doctrine only prohibits relitigating issues once there has been a final judgment on the merits of an action. *Res judicata* is intended to prevent two *separate actions* but does not prevent timely appeals on all issues decided when a trial is bifurcated. *See* Restatement (Second) of Judgments § 13 (1982).

This is not a case in which the NFL has attacked the injunction in a separate action, or has denied its effect. Rather, a panel of the Ninth Circuit—the same panel that heard the initial appeal—has reviewed and vacated a subsequent judgment for money damages in favor of the Raiders while leaving intact the injunctive relief that entitles the team to play in Los Angeles. No issue of *res judicata* is presented and it is not surprising that the Raiders can offer no authority for their extraordinary view of the law.[5]

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[5] The Raiders' argument, if accepted, would make appellate review a hollow remedy. The NFL had no reason to present its offset defense prior to the damages trial. If the Raiders' view of *res judicata* were accepted, the Ninth Circuit would have been powerless, because of the outstanding injunction, to correct the District Court's error in refusing to allow the NFL to present its offset defense and in refusing to instruct the jury on that defense.

Federated Department Stores, Inc. v. *Moitie*, 452 U.S. 394 (1981), offers no support for the Raiders' novel view of *res judicata*. In *Moitie*, a party whose federal case had been dismissed and who did not appeal that dismissal, sought to bring a second action in state court based on the same facts. This Court, in a straightforward application of settled law, held that a second action could not be maintained. 452 U.S. at 398-402. *Moitie* has no application to this case, where a bifurcated trial predictably resulted in separate appeals and where the appellate court did no more than rule on various legal and factual issues in the order that those points were necessarily presented.

In the end, the Raiders' argument is based not on *res judicata*, but rather on an asserted "inconsistency" in the two opinions of the Ninth Circuit. The Raiders claim that the more recent opinion "*rests* upon the inconsistency" and must therefore be wrong. (Pet. at 8) (emphasis in original) The alleged "inconsistency" is the court's holding that the value of the Los Angeles opportunity "belonged to the league as a whole, or in other words, was owned in part by each franchise owner." (A-26) Petitioner characterizes this holding as

> "a different way of expressing precisely the contention on which [Judge Williams] had unsuccessfully dissented from the previous decision on liability, *viz.*, that NFL and its members are an 'entity', and that the right to play football in the National Football League in Los Angeles is property of that 'entity' for which it can charge a price to any member wishing to move." (Pet. at 6)

The inconsistency between the two decisions is not, however, that identified by the Raiders. Apart from other objections to its holding on liability, it clearly was consistent for the court below to conclude that the League had not employed proper procedures in excluding the Raiders from Los Angeles, and also to conclude that the League had a valuable property right in the Los Angeles location that the Raiders, having appropriated it, should account for in any damage calculation. The only inconsistency in the two decisions is between the court's conclusion that the League did have a common property right in the Los Angeles opportunity

and its conclusion that the League was not free under the Sherman Act to protect that right. This latter conclusion is the subject of the Petition in No. 86-1972.[6]

II. The Opinion Below Properly Determined The Offset Issue, And Did So In A Manner Consistent With Antitrust Law And Policy

A. No Conflict Exists Between The Resolution Of The Offset Issue By The Court Below And Any Decision Of This Court Or Any Other Court Of Appeals

The Raiders can point to no conflict between the opinion below and any opinion of this Court or another court of appeals on the appropriateness of an offset in the circumstances presented in this case.

The Court of Appeals relied on three different lines of authority, each of which separately established the error in the District Court's failure to admit evidence and instruct the jury on the offset. The first, based on decisions such as *Hanover Shoe* and *Siegel* v. *Chicken Delight,* establishes that a damage award must reflect not only a plaintiff's losses, but also "benefits that would not have been received by the plaintiff had there been no violation. . ." (A-23) By moving to Los Angeles, the Raiders "appropriated for themselves the expansion value that had accumulated in Los Angeles." (A-26) The value of the Los Angeles opportunity was largely attributable to "the NFL's well-established and widely followed nationwide entertainment product", and not to any antitrust violation. (A-25) Because the NFL's successful joint production and marketing of its product made Los Angeles a valuable expansion opportunity, the court correctly concluded that any damages awarded to the Raiders had to take into account the valuable property right the Raiders had obtained.

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[6] The Raiders' invocation of Federal Rules of Civil Procedure 42(a) and (b), and 54(b) (Pet. at 7) is a transparent and flawed effort to assert a contention of some broader significance. There has been no transgression of these rules and the decision below creates no threat to their continued utility.

Second, relying on *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); and *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), the court below held that an offset was appropriate where, as here, a damage judgment "includes damages which go beyond the scope of the adjudicated antitrust liability." (A-24) Because the NFL's development of the Los Angeles opportunity was lawful, "an award of that opportunity to the Raiders would constitute a recovery for conduct of the NFL which was not found to be illegal." (A-26) Thus, the Raiders had been given "a windfall benefit" that exceeded "the scope of the antitrust verdict", and an offset to the damage award was appropriate. (A-27)[7]

Finally, the Court relied on a line of cases (*e.g.*, *Albrecht* v. *Herald Co.*, 452 F.2d 124 (8th Cir. 1971)) establishing that a plaintiff may recover damages based on either "lost profits" or the "value of a business", but not both. (A-31 to A-32) Should the Raiders be awarded both the Los Angeles business opportunity, the value of which is its potential profitability, and the interim lost profits for 1980-82, the Raiders would improperly receive a double recovery.

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[7] There is substantial question as to whether any award to the Raiders is consistent with the teachings of *Brunswick*. The sole basis on which antitrust damages may be awarded is for injuries "of the type the antitrust laws were intended to prevent and that flow[] from that which makes defendant's acts unlawful." *Brunswick*, 429 U.S. at 489. The only restraint on competition identified by the court below was the prevention of competition between the Raiders and the Rams in Los Angeles, and, to be recoverable, any damages must flow from that restraint. But the Raiders' evidence on damages completely ignored the presence of the Rams, and assumed, for example, that the Raiders could charge substantially higher prices for tickets, advertising, and the like, notwithstanding the presence of a competitive alternative. Thus, the judgment below took no account of such competition and awarded damages solely on the basis of what the Raiders projected they would earn in Los Angeles, as if merely keeping the Raiders out of Los Angeles, irrespective of any impact on competition that the Sherman Act is designed to protect, were a violation.

The Raiders complaint that they were not heard below on the offset issue (Pet. at 5 n.5) is without merit. They were sufficiently aware of the NFL's offset defense to devote an entire section of their brief in the court below to that issue. They argued to the trial court that one aspect of the NFL's defense was an "attempt to offset the damages suffered by the Raiders by an increase in value attributable to the Raiders' franchise being in Los Angeles. . ." (CR 2376 at 2) And the League squarely asserted its right to control the disposition of the Los Angeles opportunity in both the liability and the damages trials and requested instructions on the offset issue at the damages trial. (CR 1090, 2042)[8]

In an effort to create the appearance of a conflict, the Raiders cite this Court's decision in *Randall* v. *Loftsgaarden*, 106 S. Ct. 3143 (1986). That case presented no issues under the antitrust laws, and instead required this Court to reconcile several different remedial provisions of the securities laws, one of which provided that a plaintiff may recover no more than "his actual damages on account of the act complained of." 106 S. Ct. at 3148, *citing* § 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a). This Court concluded that tax benefits need not be offset against a damage award under that statute. 106 S. Ct. at 3150. The case involves only construction of one section of the 1934 Securities Exchange Act, and has nothing to say about the proper computation of damages for violations of the antitrust laws.[9]

[8] References to "CR" are to the Clerk's Record in the District Court and to Tr.2d are to the transcript of the second liability and the damages trial.

[9] Because *Randall* focused on the proper treatment of tax benefits, it plainly has no application here. But even as to tax benefits, *Randall* broke no new ground. In *Hanover Shoe*, 392 U.S. at 503, this Court similarly refused to offset taxes in computing antitrust damages.

B. The Offset Does Not Deny Petitioner Any Relief To Which It Is Entitled Under The Injunction

By virtue of the District Court's June 1982 injunction, the Raiders presently play in Los Angeles, and were permitted to acquire a franchise opportunity that the Court of Appeals found belonged to the NFL as a whole and that could otherwise have been sold by the League and the proceeds distributed for the benefit of all the members.

The excess value of that franchise over the value of the Raiders' Oakland franchise was plainly recognized throughout the case. Thus, the Raiders' managing partner "testified that the Raiders increased their value by some $25 million by moving to Los Angeles." (A-26) Counsel for the Raiders in his questioning demanded that NFL Commissioner Rozelle agree that a new Los Angeles franchise "is worth at least $20 million more" than a new Oakland franchise. (Tr.2d 3153) And in final argument, Raiders' counsel referred to "the hundred-million-dollar jackpot in Los Angeles." (Tr.2d 7562) In short, as the Court of Appeals held in its second opinion—its first opportunity to consider the issue—the Raiders seized a valuable business opportunity from the remainder of the League as a result of the injunction.

The Raiders are flatly wrong to contend that the decisions below force them to choose between injunctive relief and damages. (Pet. at 11) The decisions entitle the Raiders to play in Los Angeles but do not authorize them to take from their League partners the value of that opportunity, which is not tainted with illegality. If the interim lost profits found by the jury are greater than the amount by which the value of a Los Angeles franchise exceeds the value of an Oakland franchise, the Raiders will receive that difference three-fold. The Raiders have no more been forced to choose between damages and equitable relief than were the plaintiffs in *Hanover Shoe* or *Siegel* v. *Chicken Delight*. They are simply being precluded from enjoying as a windfall benefit a property right that belonged to the League.

Concerned that the offset may wipe out the damages found by the jury, the Raiders mistakenly argue that because the Clayton Act provides for both damages *and* injunctive relief, (Pet. at 11) a litigant is entitled as of right to both. In a consistent line of decisions this Court has made clear, however,

that antitrust damages do not flow from a violation as a matter of course, but only where a plaintiff makes "some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981); *Brunswick*, 429 U.S. at 489. As Professor Areeda has counselled, this may properly result in an antitrust "injury that does not warrant a damage award." P. Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L.Rev. 1127, 1128 (1976).

C. The Offset Is Properly Deducted Before Trebling In Determining Petitioner's Actual Damages

Relying solely on cases involving settlements and unrelated counterclaims, the Raiders assert that the Court of Appeals erred in directing that the offset be deducted prior to trebling. (Pet. at 15-17) This case involves neither a settlement nor a counterclaim, but rather a windfall recovery growing out of the very transaction that was the occasion of the violation and the Raiders' interim loss of profits. The authorities are consistent as to how offsets should be handled in such cases, and the Court of Appeals properly determined that such a windfall served to reduce or eliminate the Raiders' actual damages.

The Raiders rely chiefly on the dissenting opinion of Judge Nelson, while failing to note precisely how narrow that dissent was. There was, as has been indicated, no disagreement among the court that the award to the Raiders of the Los Angeles opportunity was a windfall. (A-41) Similarly, Judge Nelson concurred that offsets related to the antitrust violation should be deducted prior to trebling. (A-42) In her view, "the court should *separately* assess all offsets which are not related to the pre-trebled damage calculation. That is, offsets which do not flow from the violation itself should be deducted *after* trebling." (Id.) (emphasis in original)

In short, the only disagreement expressed in the opinions below was whether the windfall in this case was sufficiently related to the Raiders' transfer to Los Angeles that it should be deducted before or after the trebling of the interim loss of profits found by the jury. The court's resolution of that question—that the offset "should occur prior to trebling" (A-31)—rests on the

facts of this case, and presents neither a conflict nor a legal issue that demands resolution by this Court. The seizure of the League opportunity resulted when the Raiders moved to Los Angeles. The interim loss of profits on which the jury's award was based was intended to compensate for the delay in the move to Los Angeles. It is difficult to conceive of a case in which the damage award and the source of the offset are more intimately related.

This Court's holdings in *Hanover Shoe*, *Brunswick*, and *J. Truett Payne*, all require that a plaintiff's recovery be limited to three-fold its actual damages. In *Siegel* v. *Chicken Delight*, the Ninth Circuit correctly applied this rule of law and reduced plaintiff's damages prior to trebling. The Fourth Circuit reached a similar result in *Burlington Industries, Inc.* v. *Milliken & Co.*, 690 F.2d 380, 385-86, 391 (4th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983) (offsetting before trebling "the amount which plaintiffs would have paid . . . in the absence of the royalty-maintenance conspiracy.").[10] And in *Telex Corp.* v. *IBM*, 367 F. Supp. 258, 352-53 (N.D. Okla. 1973), *aff'd in part and rev'd in part on other grounds*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975), the court upheld an offset based on plaintiff's unlawful misappropriation of IBM's trade secrets; because "plaintiff's prospective market position . . . would have included [this] competitive advantage", an adjustment was required "before plaintiff's damages are trebled." *Id.* The court in *Telex* considered and distinguished many of the counterclaim and settlement cases cited by Judge Nelson's dissent on this issue.

Because this case does not involve a deduction of an unrelated counterclaim, cases such as *Jerard Associates Inc.* v. *Stanley Works*, 1966 Trade Cas. (CCH) ¶ 71,820 (S.D.N.Y. 1966), (Pet. at 16) are inapposite. Cases involving deductions of settlement amounts are even further removed from the issue at hand. A settlement, by definition, is not part of the underlying transaction, but rather a subsequent reduction of already accrued damages. Thus, to deduct amounts received in settlement before

[10] The court in *Burlington Industries* specifically distinguished the treatment of related offsets and amounts received in settlement, deducting the former *before* trebling and the latter *after* trebling. *Compare* 690 F.2d at 385-86, *with id.*, at 391-92.

trebling would deprive a plaintiff of its entitlement under Section 4 to receive three times its actual damages. Further, a rule requiring the deduction of settlement amounts before trebling would create a powerful disincentive for antitrust plaintiffs to settle. Neither of those concerns apply in this case and petitioner's reliance on such cases simply underscores the validity of the holding below.[11]

D. The Offset Creates No Immunity From The Antitrust Laws

The decision below leaves intact—mistakenly, in respondents' view—a judgment that the League and its members violated Section 1 of the Sherman Act. Under the District Court's injunction, respondents may not inhibit petitioner from presenting the League's joint product in Los Angeles. And respondents remain liable to the Raiders for treble such actual net damages as may be found on remand, as well as for costs and attorneys' fees.

Under these circumstances, the suggestion that respondents have somehow been immunized from the antitrust laws is not merely disingenuous; it is plainly false.[12] Nor does the opinion establish any concept of territorial exclusivity. (Pet. at 20) Instead, it holds that one member of a lawful joint venture may not appropriate for itself a property interest that properly belongs to the venture as a whole, or as applied to this case, the League is not required by the antitrust laws to give away even to one of its members the "fruits of its success . . . " *Berkey Photo*, 603 F.2d at 298.

Moreover, as the decisions in *Perma-Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), and *Hanover*

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[11] The Raiders' reliance on the Ninth Circuit's recent decision in National Basketball Association v. SDC Basketball Club, Inc., 815 F.2d 562, 570 (9th Cir. 1987), (Pet. at 17) is misplaced. That case merely refused to award damages to the NBA for a lost expansion opportunity on a motion for summary judgment. It did not, however, question either that an offset is appropriate in this case or that the deduction should take place prior to trebling.

[12] The Raiders lengthy—and often mistaken—description of various pieces of legislation that Congress has considered over the past three decades (Pet. at 18-20) demonstrates that, far from being immune, sports leagues remain subject to the antitrust laws.

Shoe demonstrate, antitrust policy has long recognized the proper role of offsets in preventing windfall recoveries and in limiting damages to actual losses attributable to conduct forbidden by the antitrust laws. *See also Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 106 S. Ct. 1348, 1354 (1986); *Brunswick, supra.* Although the Raiders claim that the decision below will cripple private enforcement of the antitrust laws, (Pet. at 15) the court below was sensitive to that concern, and struck the proper balance between encouraging private enforcement and awarding damages in a manner consistent with settled law. (A-30 to A-31) The availability of injunctive relief and the recovery of costs and attorneys' fees—as well as the prospect of a three-fold recovery of their *actual* damages—should offer more than sufficient incentive for aggrieved parties to bring suit. *See* II P. Areeda & D. Turner, *Antitrust Law* ¶ 347d at 257 (1978). As the court below noted, "[n]o case cited by the Raiders stands for the proposition that encouragement of antitrust suits requires a damage recovery (before trebling) to go beyond the extent of the plaintiffs' actual injury." (A-31)

CONCLUSION

The petition presents no issues that create a conflict or are otherwise worthy of review by this Court and, accordingly, should be denied.

Respectfully submitted,

COVINGTON & BURLING
DANIEL M. GRIBBON
JOHN H. SCHAFER
PAUL J. TAGLIABUE
LYLE JEFFREY PASH
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
FRANK ROTHMAN
300 South Grand Avenue
Los Angeles, California 90071
(213) 687-5000

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No. 86-1968

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

LOS ANGELES RAIDERS, a limited partnership
Petitioner,

VS.

NATIONAL FOOTBALL LEAGUE, et al.
Respondents.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

*MOSES LASKY
LASKY, HAAS, COHLER & MUNTER
505 Sansome Street, 12th Floor
San Francisco, CA 94111
Telephone: (415) 788-2700

JOSEPH L. ALIOTO
ALIOTO & ALIOTO
650 California Street, 23rd Floor
San Francisco, CA 94108
Attorneys for Petitioner
Los Angeles Raiders

* Counsel of Record

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The brief of respondents (hereafter "NFL") in opposition confirms that the petition should be granted.

I. FIRST QUESTION PRESENTED: RES JUDICATA OF AN AFFIRMED RULE 54(b) JUDGMENT

The basic fallacy of the opposition appears at the outset. It denominates Raiders' moving to Los Angeles as a "unilateral seizure of [a] valuable business opportunity" that "belonged to the League as a whole" (p. 2). But Raiders "seized" nothing, unilaterally or otherwise. Raiders moved to Los Angeles only when a *final* judgment of a district court adjudicated that it was a violation of the Sherman Act for NFL to keep Raiders out of Los Angeles and enjoined NFL from preventing Raiders from doing so. NFL concedes that, at the trial which culminated in that final judgment, it urged as a defense to liability that the opportunity to place an NFL team in Los Angeles belonged to the league (p. 8). When the defense failed and the judgment was appealed, it was not modified to provide that the injunction was conditioned on

Raiders paying a price. The judgment was unconditional and was affirmed. NFL argues that on the later appeal from the damages judgment the court below did not tamper with that injunction (p. 3). On the *contrary*, the court openly based its decision on the *premise* that the final injunction was "overbroad", and "*exceeded* the scope of the liability verdict" (Petition, p. 8).

NFL's fallacy comes to a sharp focus when it states (p. 4):

> "The Raiders' argument also depends on a mistaken view of *res judicata*. That doctrine only prohibits relitigating issues once there has been a final judgment on the merits of an action. *Res judicata* is intended to prevent two *separate actions* but does not prevent timely appeals on all issues decided when a trial is bifurcated. *See* Restatement (Second) of Judgments § 13 (1982)." [Italics in original.]

There was here more than bifurcation under F.R.Civ.P. Rule 42(b); there was finality of the judgment under Rule 54(b).

NFL continues:

> "This is not a case in which the NFL has attacked the injunction in a separate action, or has denied its effect. Rather, a panel of the Ninth Circuit—the same panel that heard the initial appeal—has reviewed and vacated a subsequent judgment for money damages in favor of the Raiders while leaving intact the injunctive relief that entitles the team to play in Los Angeles."

This concedes that if the prior judgment had been entered in a separate action, it would constitute a *res judicata*. The contention reduces itself to this, that simply because the prior judgment was in the same action it was not final.

Thereby, NFL necessarily concedes that the case presents the very first question stated in the petition, *viz.*: Is a *final* judgment any less *res judicata* where the issue decided was carved out under Rule 42(b) and the judgment became final under Rule 54(b) than if rendered in a separate action? The decision below on its very face has ignored the *res judicata*, and certiorari should issue to prevent the mischief from spreading through the law.

NFLs' fallacy is disclosed in all nakedness in its statement at page 11:

> "The seizure of the League opportunity resulted when the Raiders moved to Los Angeles. The interim loss of profits on which the jury's award was based was intended to compensate for the *delay* in the move to Los Angeles." [Italics added.]

But suppose there had been no delay. In early 1980 a preliminary injunction issued in the district court enjoining NFL from preventing Raiders from moving to Los Angeles, but it was stayed and, in December, 1980, reversed by the Court of Appeals, *Los Angeles Memorial Coliseum Com'n. v. Nat. Football League*, 634 F.2d 1197 (9 Cir. 1980). Had it not been stayed and reversed, Raiders would have been in Los Angeles in 1980, and there would have been no delay. Respondents' reasoning would lead to the conclusion that, when the final decree in 1982 immunized Raiders' presence in Los Angeles from NFL veto, Raiders would have had to pay NFL full value for the "Los Angeles opportunity", with an offset against nothing. But to effect that result, the final injunction would have had to be *reconstructed* to provide that the right to move to Los Angeles was conditioned on payment of a price to NFL.

II. SECOND, THIRD AND FIFTH QUESTIONS:

NFL nowhere tells the Court what body of law granted to NFL "ownership" of the "opportunity" to play in Los Angeles" and thereby overrode the prior adjudication that the Sherman Act forbids denial of that opportunity to Raiders. NFL does not tell one from what bottle this genie emerges. As it does not come from California law, NFL must be contending that it comes from antitrust law. Even apart from *res judicata*, such a remarkable proposition of new antitrust law, rejected as a defense to liability, will spread widely as a defense to damages if not checked. What Justice White (in the Court's opinion in *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481, 493 (1968)) said of the passing-on defense is applicable here:

> "[I]t is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories."

III. FOURTH QUESTION: OFFSET BEFORE TREBLING

In support of offsetting before trebling, NFL draws a long bow by citing *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9 Cir. 1971), *Burlington Industries v. Milliken & Co.*, 690 F.2d 380 (4 Cir. 1982), and the district court decision in *Telex Corp v. IBM*, 367 F.Supp. 258 (N.D.Okla. 1973). These are not offset cases at all but determinations of the antitrust damages. In *Siegel* plaintiff's damage from an unlawful tie was not the total unsegregated consideration paid as the purchase price of goods illegally required to be purchased plus the fee for a license for trademarks and know-how, but that portion of the consideration attributable to the purchase price, as royalty for the trademark license and know-how was legitimate. In *Burlington* the illegality was conspiratorial fixing of royalties for use of certain patented machines, and it was held that the damages were the total royalties paid less what would have been paid as royalty for use and purchase of the machines had there been no antitrust violation. In *Telex*, the measure of plaintiff's damages for IBM's supposed violation of the antitrust laws* was a determination of the lawful competitive position Telex would have occupied in the industry but for the antitrust violation, and that competitive position did not include advantages that the plaintiff had by virtue of unlawful appropriation of defendant's trade-secrets and copyrights. Such was the reasoning.

Damages from the violation in the present case consist of all the "delay" damages, to use NFL's terminology. If there was such a thing as NFL ownership of the "opportunity to play in Los Angeles", the value of that opportunity was the same whether there had been any delay or not. It would have been the same if the preliminary injunction had stayed in effect and allowed the

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* On appeal it was held that IBM had not violated the antitrust laws.

Raiders to move in 1980 so that no delay would have occurred. (See p. 3 above.) In short, the damages for delay and the value of the opportunity to play in Los Angeles are not connected. Antitrust law trebles the antitrust damages to forward a public policy; no law and no policy treble the value of the "opportunity to play in Los Angeles". Judge Nelson was entirely correct in her dissent on this issue, and the majority decision calls for this Court's correction to avoid confusion and undermining Congress' purpose in directing trebling.

CONCLUSION

A variety of incorrect statements appears in NFL's brief in opposition, such as that the Court of Appeals' offset theory is one that NFL urged in the district court and on the appeal, rather than, as Judge Nelson denominates it, an idea of the Court of Appeals raised by it "*sua sponte*". Similarly, NFL makes statements concerning testimony given in the trial court. At this juncture, where the issue is whether there are important questions to review, we refrain from pursuing these items further.

We respectfully submit that the petition should be granted.

DATED: San Francisco, California, August 28, 1987

* MOSES LASKY
LASKY, HAAS, COHLER & MUNTER
Professional Corporation

JOSEPH L. ALIOTO
ALIOTO & ALIOTO
Attorneys for Petitioner
Los Angeles Raiders

* Counsel of record